TRANSCRIPT OF THE RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 317

WILLIAM SHEPARD, CHARLES McLEISH, STEPHEN McLEISH, AND JOSEPH BURR, APPELLANTS

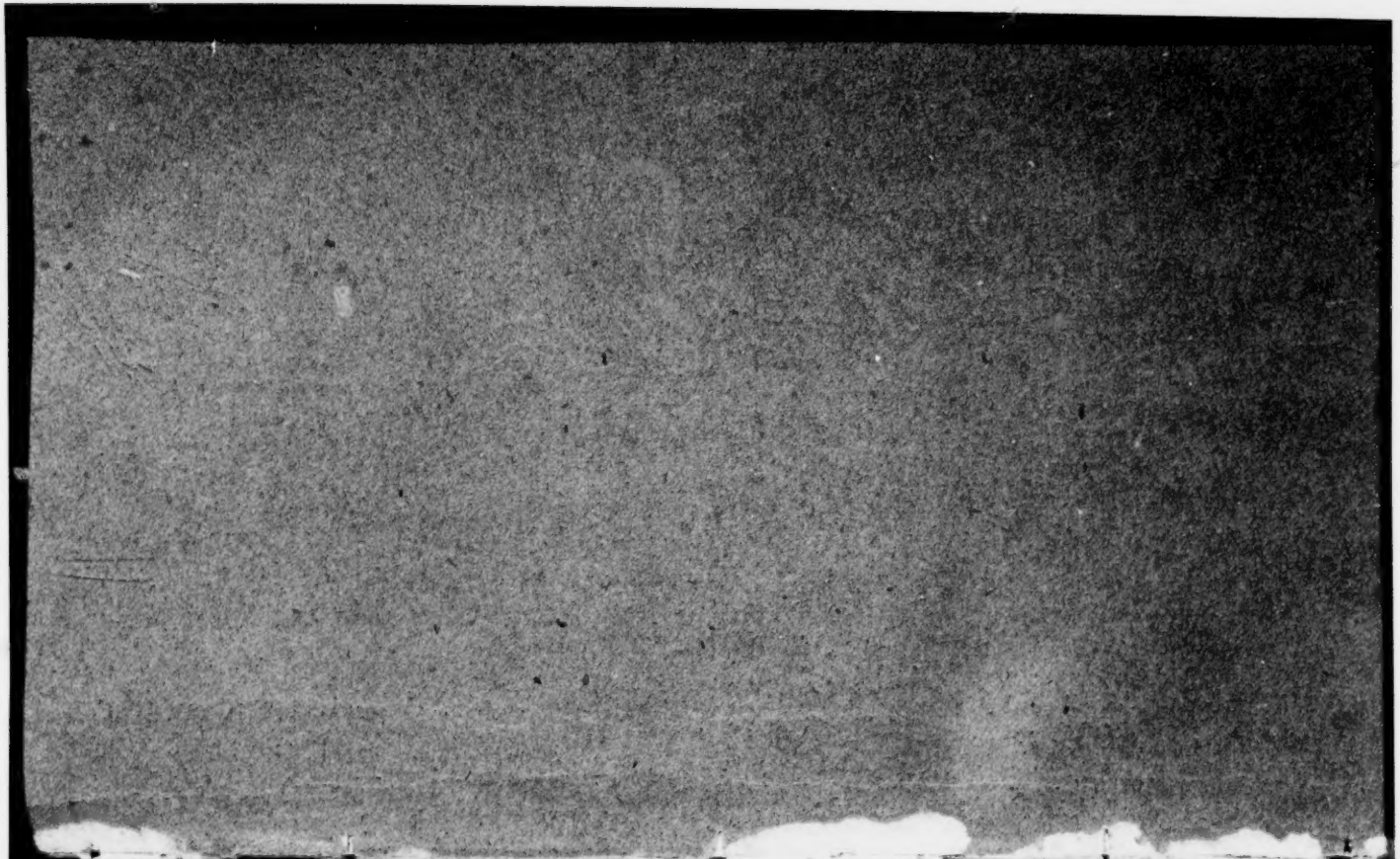
vs.

C. R. D. BARRETT, TREASURER OF FRANKLIN COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED SEPTEMBER 10, 1917

(18,638.)



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(18,833.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 217.

WILLIAM SHEPARD, CHARLES McLEISH, THOMAS McLEISH, AND JOSEPH BUSH, APPELLANTS,

vs.

O. E. D. BARRON, TREASURER OF FRANKLIN COUNTY, OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 & 2 *Transcript of Record, Case No.* 924.

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Columbus, Ohio, in said district, on the first Tuesday of December being the fourth day of that month, in the year of our Lord one thousand nine hundred, and of the American Independence the one hundred and twenty-fifth.

Present: The Honorable Albert C. Thompson, district judge.

Among the proceedings were had the following, to-wit:

WILLIAM SHEPARD ET AL., Complainant-, *vs.* O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.	No. 924. In Equity.

Be it remembered, that heretofore, to-wit, on the 12th day of June in the year of our Lord one thousand eight hundred and ninety-nine, came the complainant- herein, by *its* solicitors and filed in the clerk's office of the court aforesaid *its* certain bill of complaint — is clothed in the words and figures following, to-wit:

Bill of Complaint.

3 Bill of complaint.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD and CHARLES MCLEISH, Leonard Carr, Complainants, *vs.* O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.	In Equity. Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

Your orators, the above named complainants, are citizens of the State of Ohio, and they bring this suit against the above named defendant, O. E. D. Barron, who is treasurer of the county of Franklin, and State of Ohio.

Your orators say that the amount in controversy in this action, which is a civil action, amounts, exclusive of interest and costs, to more than two thousand dollars ($2,000.00), and that the controversy arises under the Constitution of the United States; that your orators

seek relief against the defendant by this suit, by reason of an attempt on his part to enforce against your orators a statute of the State of Ohio, the operation of which, if permitted, would take from your orators their property, without due process of law, and would deny to them the equal protection of the law, in contravention, and in violation of the provisions of said Constitution, and especially of section 1 of article 14 of the amendments to the said Constitution, and of section 1, of article 5, of said amendments.

Your orators are the owners of a tract of land which is situated in Marion township, of said county, and State, and which is described as follows, to wit:

Being part of half section No. 16 (number sixteen), section No. 11 (number eleven), township No. 5 (number five), range No. 22 (number twenty-two), refuge lands, as follows: Beginning at a stake in the center of the Columbus and Grandville turnpike road, northwest corner to land conveyed by Nathaniel Merion, trustee of John Barr to Elizabeth McCalla, and running thence along the west line S. 1 degree 45 minutes N. 124 poles to a stake in the south line of said half section; thence along said half section line N. 88 degrees W. 13½ poles to a stake in the center of Alum creek; thence up the creek with the meanders thereof No. 10 degrees 30 minutes W. 13 poles, N. 31 degrees 15 minutes, W. 1 pole N. 49 degrees 45 minutes, W. 42 poles, N. 36 degrees 30 minutes, W. 12.76 poles, N. 16 degrees 30 minutes, W. 30.75 poles, N. 10 degrees 15 minutes, W. 8.25 poles, N. 4 degrees 81 poles, N. 16 degrees 20 minutes, E. 971 poles to a stake in the center of said creek, where the center line of said Granville road crosses the same; thence along the center if said road N. 80 degrees E. 23 poles to the beginning, containing 39 acres one rood and 35 poles of land and water, be the same more or less, and being the same premises conveyed to John Barr by deed
4 dated October 18th, 1871, of record in the recorder's office of Franklin county, Ohio, Book 106, page 487, and conveyed by the said John M. Pugh, by deed dated November 21st, 1881, to the said William Shepard and Charles McLeish.

The said the Columbus and Granville turnpike road, has been more than fifty years, and is now, a public highway, and a county road of said county; and said tract of land is located and abuts on the south side of said road, having a frontage thereon of 1111 feet.

Your orators further say that, on or about March 31st, 1890, as your orators are informed and therefore allege, one Logan M. Bullitt, and others, whose names they are unable to state, presented a petition to the board of county commissioners of said county, which prayed for the improvement of East Broad street, in Marion township, Franklin county, Ohio, which street is identical with, and is the same highway as hereinbefore designated as the Columbus and Granville turnpike road, and on which said street the said tract of land then abutted, and now abuts.

The alleged petition, presented as aforesaid to said county commissioners, is not now on file in the office of said county commissioners, or in the office of the auditor of said county, nor was any

copy thereof made or kept by said board or auditor. Your orators are therefore unable to give a more definite statement of the contents and purport and scope of said petition.

Your orators further say that the said county commissioners entered an order on their record, on or about May 19th, 1890, authorizing and ordering the improvement of said street and road as prayed for by said petition. Said petition was filed pursuant to, and the said county commissioners pretended to make such order in obedience to an act of the legislature of the State of Ohio, entitled, "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities, and other roads and streets in certain cases," which act passed March 26th, 1890, and is published in 87 Ohio Laws, on page 113.

The said order of the said county commissioners authorized and directed that the said street and road should be widened from its then limits of sixty (60) feet to one hundred (100) feet, and that it should have a paved central portion about thirty-three (33) feet in width; that said paved part should be made of asphaltum, or other hard substance, and bordered by a single curbing of stone on each side; that the remainder of said street should be graded, the ordinary side drives constructed of gravel, and the cost of said improvement should not exceed $7\frac{25}{100}$ per front foot, and should be paid in ten annual installments.

Your orators further say that on May 19th, 1890, said county commissioners directed the appropriation of, and did appropriate, a strip of ground 20 feet wide along the whole front of said tract of land, and also along front of all lands which abutted on said street and road to the extent of the improvement that was ordered; that no compensation was ever assessed by a jury for said strip of land, your orators never having made any claim for the same; nor was any compensation made therefor in money, or secured by a deposit of money; and they further say that because no provision was made in the said assessment, under which said improvement was ordered and made, for the impaneling of a jury to assess said compensation, the said statute was declared and adjudged unconstitutional by the common pleas and circuit courts of said county, and also by the supreme court of the State.

Your orators further say that one William Fred Miller was also the owner of a tract of land which abutted on the said road and street, so ordered to be improved by said commissioners; that the said commissioners found and determined that the amount of damages which said Miller was entitled to, for land, buildings, and fences, appropriated for the widening of said street, should be the sum of twelve hundred and fifty dollars.

Your orators further allege that on or about August 4th, 1890, said commissioners issued bonds in the sum of fifty thousand dollars, the proceeds of which they ordered to be applied toward paying for such improvement, that on or about August 1st, 1891, they ordered additional bonds to the amount of sixty thousand dollars to be issued,

and the proceeds of which were ordered to be applied to the payment of the costs and expenses of said improvement.

Your orators further say that on or about August 18th, 1890, said commissioners entered into a contract with one N. B. Abbott, to construct said improvement, and that the said Abbott, afterwards, between August 4th, 1890, and October 1st, 1891, did construct said improvement; that on or about October 16th, 1890, said board ordered the county surveyor of said county to make a survey of the improvement, and to certify all the costs of said improvement, and that said surveyor complied with the said order; that his re-
6 port was received, examined and filed with the county auditor by the said county commissioners, and approved by said county commissioners, and the costs of said improvement were placed on the tax duplicate of said county, by the auditor, for collection. By said report, as approved by the said county commissioners, the costs and expenses of said improvement amount to eleven $\frac{1476}{1000}$ dollars for each front foot of said property.

Said real estate of your orators has been, since the last decennial appraisement, in 1890, valued for taxation at seventeen thousand seven hundred and seventy dollars.

Your orators further aver that on October 15th, 1891, by order of the said commissioners, the assessment for the payment of the costs and expenses of said improvement was made, and that the said assessment was made by the foot front, and not in proportion to the special benefit which resulted from said improvement to the abutting property; that the assessment included the twelve hundred and fifty dollars which was awarded, as aforesaid, to the said William Fred Miller; and that the part of the said costs and expenses, assessed in such manner, against the land of your orators, amounted to the sum of twelve thousand five hundred and eighty-six dollars and seven cents, with interest thereon at 6 per cent. per annum, payable semi-annually, from July 1st, 1890; and that the said assessment on said land of your orators was made upon the whole tract of land, and not upon the tract of land to the depth of 250 feet from the front of the same.

Your orators further aver that they have paid $11,981.22 on said assessment, but that there still remains unpaid of said assessment upon the tract of your orators the sum of $40002.34 *dollars*, with interest from July 1st, 1890.

The defendant threatens to collect the balance of said assessment, to wit, the sum of $4,002.34, under the statute of the State, authorizing the enforcement of the same as a lien on and against their said bill, and threatens to sell the said land if your orators do not pay the different installments of said assessment as fast as they become due; that an installment of said balance, namely, $1485.15 will be due on the 20th day of this month; and that the said defendant will proceed to collect the same, if not restrained by an order of this court.

On June —, 1899, your orators tendered the said defendant the

lawful amount of their legal taxes due on said real estate, to
7 wit, — dollars, but that the said defendant refused to accept the same unless the said installment of said assessment for said improvement should also be paid at the same time.

Your orators further say that if the said defendant, treasurer, should be permitted to enforce the collection of said assessment, or any part thereof, that it would be an irreparable injury to them.

Your orators say that they have no remedy in the premises, save by injunction; that by force of the statute of Ohio, when it is sought to impose upon the owner of reality any illegal assessment by injunction, he is not obliged to first pay the money on said assessment, and then bring an action to recover the same from the party who made the illegal assessment or collected the same.

Your orators further aver that the said assessment is illegal and unconstitutional; because it violates section 1 of the 14th amendment to the Constitution of the United States, and also the 5th amendment to said Constitution.

In consideration whereof, and inasmuch as your orators are remediless in the premises at law, and can have adequate relief only in a court of equity, to the end, therefore, that the defendant may answer the several matters and things hereinbefore set forth, and that this court will decree that said statute of the State of Ohio is null and void, and that the acts of the said county commissioners and auditor, and the threatened act of the treasurer are void, your orators pray that the said assessment made by said commissioners on the said land, and the said acts of the auditor, placing said assessment on the tax duplicate, and certifying the same to the treasurer for collection, may be decreed null and void; that the said defendant, treasurer, may be perpetually enjoined, restrained and prohibited from collecting any part of the said assessment yet unpaid, and from assessing any penalty against your orators for refusing to pay the same, and from instituting and authorizing, or directing any suit or suits, action or actions, or any proceeding against your orators to enforce the said pretended lien on the said property, or to collect the same from your orators; and that they may have such other and general relief as the nature of the case may require, and as to equity may seem right.

Your orators further pray that in the meantime, and during the pendency of this suit, the said defendant, his agents, attorneys, representatives, and employés, may be enjoined and restrained, as hereinbefore prayed.

8 May it please the court to grant unto your orators a writ of subpœna to be issued out of, and under, the seal of this honorable court, directed to said defendant, and commanding him to appear in this court at some day certain, to be therein named and to answer the averments of this bill, under oath, and to abide by and perform such decree as may be rendered herein.

PUGH & PUGH.
Solicitors for Complainant.

STATE OF OHIO, } ss:
Franklin County, }

William Shepard, being duly sworn, says that he is one of the complainants in the foregoing bill of complaint; that he makes this affidavit as such complainant; that he has read said bill of complaint, and is acquainted with the contents thereof, that the same is true of his own knowledge, except as to the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

WILLIAM SHEPARD.

Sworn to and subscribed before me by the said William Shepard this 3rd day of June, 1899.

[SEAL.]

E. L. DEWITT,
Notary Public, Franklin County, O.

Tax N. P. for 40c.

To the clerk of said court:

In the above cause please enter the appearance of O. E. D. Barron, as defendant, and Dyer & Williams as his solicitors.

O. E. D. BARRON, *Treasurer,*
By DYER & WILLIAMS,
Solicitors for Respondents.

And afterwards, to wit, on the 12th day of June, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 220.

Whereas, in the above entitled cause, an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the said court on the 12th day of June, 1899, at the United States court house in the city of Columbus,
9 notice of such application having been waived by the defendant herein; and the parties now appearing by their solicitors, and being heard upon such application, and it appearing that cause exists for the granting of writ of injunction, pending the final hearing of the cause, as prayed for. It is therefore ordered that upon the complainant giving security, by bond, in the sum of five hundred dollars, conditioned that the said complainant shall abide by the decision of the court, and shall — and truly pay to the defendant all damages and costs that will be sustained by him in case the injunction should be dissolved, a writ of injunction issue, commanding, restraining and enjoining the defendant, his agents, servants and attorneys from collecting any part of the assessment set out and described in the bill of complaint, and which is yet unpaid, and from assessir any penalty against said complainant for refusing to pay the sa

and from instituting and authorizing or directing, any suit, or suits, action or actions, or any proceeding against the said complainant to enforce the alleged lien described in said bill of complaint on the property of the complainant, or to collect the same from said complainant, until further order of this court, in the premises.

And afterwards, to wit, on the 12th day of June, A. D. 1899, the following bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Injunction Bond.

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } ss:

Injunction bond.

Know all men by these presents, that William Shepard and Thomas J. McLeish — held and firmly bound unto O. E. D. Barron, treasurer of Franklin county, Ohio, in the sum of five hundred ($500) dollars, to the payment of which they bind themselves, their heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 12th day of June, A. D. 1899.

The condition of the above obligation is such, that

Whereas, William Shepard, Charles McLeish and Leonard Carr, citizens of the State of Ohio, having filed on the chancery side of the circuit court of the United States for the southern district of Ohio, a bill against the said O. E. D. Barron, treasurer of Franklin county, Ohio, and having obtained an allowance, — a preliminary injunction, as prayed for in said bill, collecting and part of the assessment yet unpaid and from assessing any penalty against the property of complainant as described in said bill of complaint.

Now, if the said William Shepard and Charles McLeish shall abide the decision of said court, and pay all moneys and costs which shall be adjudged against them in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

WILLIAM SHEPARD. [SEAL.]
THOMAS McLEISH. [SEAL.]

Signed and sealed in presence of.
C. P. WHITE.
J. A. WESTORE.

And afterwards, to wit, on the 16th day of September, A. D. 1899, following answer was filed in the clerk's office of said court, ded in the words and figures following, to wit:

Answer of O. E. D. Barron, Treasurer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} In Equity.

The answer of the above named treasurer to the bill of complaint of the above named plaintiffs.

In answer to said bill, O. E. D. Barron, treasurer of Franklin county, Ohio, says as follows, viz:

I. He admits at the time of the filing of the bill, the complainants named therein were the owners of the real estate described in the bill, but says that thereafter, to wit, on the first day of July, 1899, by a warranty deed recorded in Deed Book 316, page 320, in the recorder's office of Franklin county, Ohio, the complainant, Leonard Carr, transferred and conveyed to Thomas J. McLeish and
11 John Busch, his undivided one-third interest in said real estate, in which deed said Thomas J. McLeish and John Busch assumed all taxes and assessments that may be a lien on said real estate, as a part of the purchase price for said premises, and that said complainant, Leonard Carr, has no further interest in the subject matter of this suit, and as to him the bill should be dismissed.

II. He admits that the Columbus and Granville road has for many years been a public highway, and that the tract of land described in the bill abuts on the south side of said road and has a frontage thereon of 1111 feet.

III. Defendant also admits that on the 31st day of March, 1890, Logan M. Bullitt and others, filed with the board of county commissioners a petition asking for the improvement of East Broad street (which is the same as the Columbus and Granville road), from the east side of Alum creek (which said creek is the east corporation line of the city of Columbus), eastward to a road known as the Cassady road, under the provisions of an act of the General Assembly of the State of Ohio, entitled "An act to authorize county commissioners in counties in which there are situated cities of the first grade, of the second class to improve roads extending from such cities or other roads or streets in certain cases," passed March 26th, 1890, and published in 87 Ohio Laws, page 113, which said petition has been lost or stolen and can not be found, and no copy of which has been preserved.

IV. Defendant admits that on the 19th day of May, 1890, the said

county commissioners entered an order on their record authorizing and ordering said improvements to be made, and that said improvement should be of the width of 100 feet throughout its entire length, and the county surveyor was ordered to survey said road and erect stakes in front of each parcel of property marking the lines of said roadway and doing whatever other work was necessary for carrying out said work as ordered.

V. This defendant denies that on the 19th day of May, 1890, said county commissioners directed the appropriation of, and did appropriate, a strip of ground 20 feet wide along the whole front of said tract of land belonging to complainant in the manner alleged in the bill, but defendant says that the truth in regard to the taking of said strip of ground is that complainants, by their petition filed with said county commissioners on said 30th day of March, 1890, requested that said roadway be widened from sixty to 100 feet and offered said 20 foot strip to said commissioners and voluntarily dedicated the same to public use for a highway, and requested said commissioners to improve the same and assess the cost of said improvement upon the abutting property, including the property of complainants in said bill described, and that no appropriation of said strip was necessary, nor was any made.

VI. Defendant further answering admits that said act of the General Assembly was by the common pleas and circuit courts of Franklin county declared and adjudged unconstitutional, "because no provision was made in the said act, under which said improvement was ordered and made, for the impaneling of a jury to assess compensation for complainants' land so taken for the widening of said roadway;" but defendant denies that this act recited in complainants' bill has ever been declared and adjudged unconstitutional by the supreme court of the State of Ohio.

VII. Defendant says that section 13 of the act of the General Assembly above referred to, with reference to which act the contract for this improvement was made, provides that when the said order for said improvement was made by said county commissioners the said county commissioners "shall designate two or more owners of property abutting on said improvement who, with the county surveyor, shall constitute a board which, after the contract for the improvement has been made by the commissioners, may elect a superintendent who shall see that said contract is performed according to the true intent, and all orders of the county surveyor in furtherance thereof are obeyed;" and that under and in accordance with said provision, the said county commissioners, on the 19th day of May, 1890, appointed J. C. Lunn, J. G. Mitchell, Albert McCalla, William Shepherd (one of the complainants), and John J. Dun, surveyor, as commissioners of the East Broad Street improvement of Marion township, and that said complainant, William Shepherd, accepted said appointment and acted as one of the commissioners for the making of said improvement.

VIII. This defendant further admits that on or about August 1st,

1890, said county commissioners entered into a contract with one N. B. Abbott for the construction of said improvement, and between that date and October 1st, 1891, said improvement was made, and that on or about October 16th, 1891, the county commissioners ordered the surveyor to certify all the costs of said improvements to the county auditor, and that said cost was placed upon the
13 tax duplicate of said county and amounted to the sum of $11.2476 per foot as in said bill alleged.

IX. This defendant also admits that bonds to the total amount on one hundred and ten thousand dollars were sold as alleged in complainants' bill for the purpose of paying for said improvement, and that complainants' said tract of land described in the bill is valued for taxation at $—, but defendant further says that said valuation for taxation was not, at the time said improvement was made, more than one-half the real value of said property.

X. Defendant further answering admits that the assessment for the payment of the costs and expenses of said improvement was made by the foot front, but he denies that said assessment was not made in proportion to the benefit which resulted from said improvement to the abutting property.

On the contrary defendant shows to the court that section 17 of the act of the General Assembly referred to in complainant's bill provides as follows, viz.:

"In no case shall said commissioners take action for the improvement of any road under the provisions of this act until after they shall have made a personal inspection and examination of the line of said proposed improvement, and are satisfied that with such improvement the foot frontage of the lands abutting thereon will be well worth double the estimated expenses of such improvement, which inspection, examination and estimate, together with their present valuation per foot front of such lands, shall be by said commissioners made a matter of record, and no improvement shall be by them ordered, unless said record justifies it."

On May 3rd, 1890, in compliance with section 17 above quoted, said board of county commissioners of Franklin county, in open session of the said board, made and entered upon their journal a finding that since the filing of the petition for the improvement of East Broadway street they made a personal inspection and *and* examination of the line of the proposed improvement and had made a personal examination of lands lying upon each side of the said proposed improvement and were satisfied, after such examination and inspection, that the said improvement will be for the public welfare and convenience. The said county commissioners further found that to construct the said improvement it would be necessary to assess the lands upon each side of the said proposed improvement about the sum of $7.25 per foot front, and that the valuation
14 at that time per foot front of lands fronting and abutting upon said proposed improvement is upon an average $20.00, and after the said proposed improvement had been made as prayed for in said petition the average valuation of lands abutting thereon per

foot front will be worth at least the sum of $40.00, which will be more than double the estimated expense of the said proposed improvement; all of which finding were made by and with the knowledge, consent and approval of said complainants, and they, and each of them, have acquiesced in said findings until the filing of their bill in this cause.

XI. The defendant further says that the complainants, and each of them, actively promoted and assisted in the making of all of said improvement and acquiesced in and authorized the making of all the expenditures and the assessments by the foot front complained of in their bill, and authorized the assessment of said costs against their property as described in the bill. In addition to what has already been set out in this answer, the more material acts in the promotion of said improvement by the plaintiffs are as follows, viz.:

1. The said complainants, together with others, signed the original petition which was filed with the said county commissioners on the 31st day of March, 1890, praying for the making of said improvement as in the bill alleged, and said board of county commissioners would not have ordered said improvement to be made, except for the acts and requests of complainants and others that said improvement be made.

2. On or about the — day of ——, 1890, the complainants under the name and style of the Alum Creek Ice Co., which name was used by said complainants in business, and which name was used by them interchangeably with their individual names in their transactions with said commissioners, with others, filed with the county commissioners a request in writing that a 15 inch sewer pipe be laid on the south side of the said street, and that a 24 inch sewer pipe be laid on the north side of said street, and that a suitable gutter be laid on the side next to the curb on the two outer drive ways on said Broad street, and "that the expense of said work be assessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid." The construction of said sewers was necessary for the proper completion of said improvement, and said sewers were a direct benefit to the abutting property of complainants and others.

15 3. On or about the — day of ——, 1890, the said complainants filed with the said county commissioners a petition in writing signed by their own individual names, with others, in which petition they requested said county commissioners to cause all bonds issued for the payment of the expense of the said improvement to be for a period of 20 years from the date thereof; and stating also if said county commissioners could extend the time to 20 years for the bonds already sold, such extension of time would be satisfactory to said complainants.

4. On or about the 29th day of June, 1891, said complainants under the name of the Alum Creek Ice Co., together with other land owners abutting upon said improvement filed with the said county commissioners a written communication, whereby they expressly withdrew all objection to said improvement and the assessment of

their said real estate therefor on condition that the Columbus Land Association, one of the abutting property owners would secure and pay the entire expense of removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle. Said circle was established by the county commissioners on the 18th day of August, 1890, and became a part of said improvement, and was declared to be a public circle, and was 250 feet in diameter, the land for which was donated by the Columbus Land Association, and said circle was dedicated for the public use.

5. On or about the 2nd day of September, 1891, the complainants, William Shepherd and Charles McLeish, and also the Alum Creek Ice Co., filed with the county commissioners of Franklin county, Ohio, a petition in writing in which petition they asked for the cancellation of that part of the contract with said N. B. Abbott, which provided for sodding the sides of said roadway, and in said communication the said parties last above named, together with other abutting property owners, each promised to see that grass seed was sown upon said driveways of said Broad street, and to take upon themselves the care and charge of the same, and in obedience to and in compliance with said petition the said county commissioners procured the cancellation of the part of said Abbott contract above referred to.

6. On the 28th day of September, 1891, the said plaintiffs, together with other abutting property owners, filed with the said county commissioners a written communication in which they recited that on the 31st day of March, 1890, a petition was by them presented to the board of county commissioners, praying for the extension
16 of East Broad street, as alleged in the bill in this case that said original petition had been signed by all persons owning property abutting upon the portion of said Broad street, on which said improvement was to be made; that proceedings were had by said board of county commissioners which resulted in an order for making said improvements in accordance with the prayer of their original petition; that said original petition, as well as other papers filed since said original papers, and certain orders made by said board of county commissioners relating to said improvement had been lost or mislaid; that since making said original order by the said board of county commissioners, directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said board of county commissioners, or have been made, or are now being made at the written request of each and all of the subscribing property owners, including the construction of the circular park in said street, and sewers for proper drainage, and other things not herein particularly mentioned; that by reason of said changes and extensions, the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan; that doubts have arisen as to the legality of the proceedings of said board of county commissioners in said matters, and of the bonds that have been or

may hereafter be issued by said board of county commissioners for the purpose of raising the amounts to pay the costs and expenses of said improvement.

"Now, therefore, in consideration of the said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement, for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you exe-
17 cute and issue such further amount of bonds as shall be necessary to pay the costs of said improvement."

XII. Defendant further answering says that the complainants and other petitioning land owners by the express language of their petition filed as aforesaid on March 30th, 1890, asked said county commissioners to make said improvement under and in accordance with the provisions of the act of the General Assembly named in the bill, and said improvement was so ordered, and defendant says that said county commissioners, in ordering and making said improvement, conformed fully with the terms, conditions and provisions of said act, and constructed said improvement in all respects in substantial compliance with the complainants' original petition and the subsequent changes therein, made at complainants' request, so that defendant avers, every material detail of said improvement was made, at and in accordance with complainants' request and with complainants' knowledge and approval.

XIII. Defendant further says that from and between the time of the completion of said improvement, and the filing of the bill in this cause, from the year 1892 to the year 1898, inclusive, complainants have, without protest, paid seven annual installments of said assessment so made against their land as in their bill alleged, each annual payment being $1258.61.

XIV. This defendant further answering admits that the sum of $1250 was granted and allowed by said county commissioners to one William Fred Miller for damages for land appropriated for the construction of said East Broad Street improvement, but this defendant does not know and can not state whether it is the fact that said $1250 so appropriated to said Miller was by said county commissioners charged in as a part of the costs and expenses of said improvement aad assessed against the abutting lands as alleged in the bill.

XV. Defendant further answering says that by reason of the

admissions made in complainants' bill and by reason of the facts set out in this answer, the complainants and each of them are by the universal principles of equity and by repeated and long-standing decisions of the supreme court of the State of Ohio, clearly estopped from obtaining the relief by injunction prayed for in their bill; that said decisions by the supreme court of the State of Ohio have long since established a rule of property with reference to the collection of street improvement assessments in this State, to the effect that active participation in causing such improvement
18 to be made, even under an unconstitutional law, will estop the parties engaged therein from denying the validity of the assessment; which rule of property the Federal courts of the United States ought to recognize and enforce, and that said complainants have brought this cause and are seeking to prosecute the same in this court for the purpose of avoiding and shunning the well known and long established and equitable rules of estoppel declared by the supreme court of the State of Ohio, and for the purpose of escaping the application of the aforesaid rule of property, and of overturning the said decisions of the supreme court of the State of Ohio.

XVI. Defendant denies that any Federal question is raised by the facts of this cause and denies that the facts shown by said bill and answer in any way contravene or are repugnant to section 1 of the fourteenth amendment to the Constitution of the United States, and section 10 of article 1 of said Constitution, or either of said sections.

Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in said bill of complaint material to be answered, according to his best knowledge and belief, humbly prays this honorable court to enter its decree dissolving the restraining order heretofore granted in this case, and this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

DYER AND WILLIAMS,
Attorneys for Def't.

STATE OF OHIO, }
Franklin County, } ss:

O. E. D. Barron, being first duly sworn, says that he is the defendant in the foregoing cause, and is the duly elected and qualified treasurer of Franklin county, Ohio, and that the facts stated in this foregoing answer are true and correct to the best of his knowledge and belief.

O. E. D. BARRON.

Sworn to before me and subscribed in my presence this the 8th day of August, A. D. 1899.

GEO. H. BARRERL,
[SEAL.] *Notary Public, Franklin County, Ohio.*

Tax notary fee and costs.

19 And afterwards, to wit: on the 5th day of December, A. D. 1899, the following entry was made on the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 326.

Upon application of complainants herein by their solicitors and by the consent of counsel for defendants, leave is granted complainants to file an amendment to the bill of complaint herein forthwith, and same is filed.

And afterwards, to wit, on the 5th day of December, 1899, the following amendment to bill of complaint was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment to Bill of Complaint.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

William Shepherd, Charles McLeish, and Leonard Carr, Complainants, *vs.* O. E. D. Barron, Treasurer of Franklin County, Ohio, Defendant.	In Equity.

Amendment to bill of complaint.

To the honorable judges of the circuit court of the United States, southern district of Ohio, eastern division:

The above named complainants, by leave of the court in that behalf first had and obtained, brings this, their amendment to their bill of complaint against the respondent, O. E. D. Barron, treasurer of Franklin county, Ohio.

And thereupon your orators complain and make amendment to said bill as follows:

1. After the word "same" at the end of the first paragraph on 6th page of the said bill, insert this allegation: "Your orators aver that the said assessment on their property was greatly in excess of the fair market value of their land to the depth of 250 feet from the said Columbus & Granville turnpike, after said improve-
20 ment was made; that the said assessment could not lawfully be made upon said land beyond said depth of 250 feet; that the said assessment was greatly in excess of the special benefits conferred upon the said land by said improvement."

2. After the word "paid" in the second paragraph on said sixth page, of said bill, insert the following: "$11,981.22."

3. After the figures "1890," at the end of the said second para-

graph on said 6th page of said bill, insert the following allegation: "And your orators affirm that the amount which they have, as above stated, paid on said assessment is greatly in excess of the benefits that were conferred by the said improvement upon their said land, either considered as a whole tract, or as a tract of land of the depth of 250 feet from the road."

Wherefore, your orators pray, as they have heretofore prayed in their original bill of complaint; that said respondent may answer, but not under oath, such oath being hereby waived, according to the practice of this court, all and singular the things and things stated and charged in said original bill of complaint, and those hereinbefore stated and charged in this, the amendment to the bill of complaint of your orators.

PUGH & PUGH,
Solicitors for Complainants.

STATE OF OHIO, *Franklin County,* } ss:

William Sheperd, being duly sworn, says that he is one of the complainants in the foregoing amendment to bill of complaint; that he makes this affidavit as such complainant; that he has read said amendment and is acquainted with the contents thereof; that the same is true of his own knowledge, except as to the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

WILLIAM SHEPHARD.

Sworn to and subscribed before me by the said William Shepard, this 4th day of December, 1899.

[SEAL.] GEO. L. STONGHTON,
Notary Public for Franklin County, Ohio.

Taxed 40c.

And afterwards, to wit, on the 16th day of May, A. D. 1900, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

21 *Replication.*

Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR
vs.
O. E. D. BARRON, Treasurer. } In Equity.

Replication of complainants in above cause to the answer of the defendant, O. E. D. Barron, treasurer.

These repliants, saving and reserving all advantages of exception to the manifold insufficiencies of such answer, for replication thereto say, that they will aver and prove their said bill and amendment to said bill to be true and sufficient, and that the said answer is untrue and insufficient.

Wherefore, they pray relief as set forth in their said original bill.

PUGH & PUGH,
Solicitors for Complainants.

And afterwards, to wit, on the 19th day of June, 1900, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

WILLIAM SHEPHARD ET AL.
vs.
O. E. D. BARRON, Treasurer, etc.

Answer to amended bill of complainants.

To the honorable judges of the circuit court of the United States, southern district of Ohio, eastern division:

22 Defendant herein, by leave of court in that behalf first obtained, files this his answer to the amended bill of complain*ant* filed against defendant, and says he admits that said assessment could not be made upon said land of complainants beyond the depth of 250 feet, and that he does not claim as the treasurer of Franklin county, Ohio, a lien upon said premises beyond that said depth. He denies that the said assessment was in excess of the

market value of said premises to the depth of 250 feet from said improvement, and that said assessment was in excess of the benefits conferred on said land by reason of the construction of said improvement, and that the amount which complainants have already paid upon said assessment is in excess of the benefits conferred by said improvement upon said land.

Wherefore, defendant prays as he heretofore prayed in his original answer, that said cause be dismissed.

DYER, WILLIAMS & STOUFFER,
TAYLOR, SEYMOUR & WEBER,
Attorneys for Defendant.

STATE OF OHIO, *Franklin County,* } ss:

Nelson A. Sims, being first duly sworn, says that he is the duly elected, qualified and acting treasurer of Franklin county, Ohio, and as such treasurer is defendant in the above entitled cause; that he has read said answer to the amended bill of complaint, and is acquainted with the contents thereof; that he believes the facts contained therein are true.

NELSON A. SIMS.

Sworn to before me and subscribed in my presence, this 18th day of June, A. D. 1900.

[SEAL.] CHAS. I. STOUFFER,
Notary Public, Franklin County, Ohio.

23 And afterwards, to wit, on the 19th day of June, A. D. 1900, the following testimony was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Testimony on Behalf of Both Parties.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.

By agreement of parties, by their counsel, the depositions of the witnesses within named were taken before Mr. George L. Stoughton, notary public, at the office of Pugh & Pugh, between the 28th day of May, 1900, and June 18th, 1900.

And it was further agreed that said depositions should be taken by a stenographer, Miss Minnie Rodgers; that the testimony should

not be required to be reduced to writing in the presence of the notary; that the witnesses should not be required to sign their names to their respective depositions, and that the testimony should be transcribed from the notes of the stenographer.

Present: Pugh & Pugh, for complainants. J. H. Dyer and A. T. Seymour, for defendant.

ANDREW MORRISON, a witness produced on behalf of complainants, being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give your name?
A. Andrew Morrison.
Q. Occupation and residence?
A. Jefferson township, Franklin county, Ohio.
Q. Occupation?
A. Farmer.
Q. How long have you lived in Franklin county?
A. Forty-eight years this last spring.
Q. Are you acquainted with the tract of 40 acres of land, situated on the Columbus and Granville road, a continuation of Broad
24 street, and owned by the complainants at the time this suit was brought?
A. Yes, sir; that is, with the ice company's property—yes.
Q. How long have you known of that tract of land?
A. Ever since I was in this county.
Q. I will ask you whether you owned a tract of land near there?
A. Yes, sir, adjoining it on the east.
Q. Are you acquainted with the improvement that was made on the Columbus and Granville road in front of this property?
A. Yes, sir; that is with the street, you mean?
Q. Describe the improvement that was made, and when it was made?
A. Well, the property is—the improvement is an asphaltum street, I think about 30 feet wide with asphaltum, and then on the sides they made an improvement and called them parks—small parks about 6 or 8 feet wide.

Mr. Dyer, counsel of defendant, objects because the petition sets that out, and the defendant admits it.

Witness continuing: The side drives of crushed stone, I couldn't tell exactly the width, but I think about 14 feet, probably on each side.
Q. When was that improvement made?
A. Why, I think it was in—I think it was commenced about 1890.
Q. When was the improvement begun and completed?
A. I think it was commenced in the fall of 1890, and completed in the fall of '91. That is my recollection of it.

Q. When it was finished what was the relation between the grade of the street or road, and the grade of the property of the complainants?

A. Why, that is, the difference between the full grade——

Q. The road is finished and the property—how did the grades correspond, and how did they differ?

A. From what it originally was?

Q. Just as they were when it was finished?

A. At the west end I think it was higher.

Q. Which is higher?

A. The street appears—the street towards the center, or the middle of the property, it runs downward.

Q. What runs down?

A. The street, then I think it rises a little again.

Q. Where is the grade of the road higher that the grade of the property when it was finished?

A. Why, at the west end.

Q. How was it at the east end?

A. Well, I think at the east end it was higher that the property near one end.

Q. When it was finished is what I want to know.

A. Well, I think it is higher at the east end; that is my recollection now.

Q. Do you know of any property having sold in that immediate vicinity before or about the time the improvement was begun?

A. Well, there was property sold there—considerable property.

Q. How near this property?

A. Well, within 50—or within about 60 rods; that is the nearest to this property—60 rods from it.

Q. What in your judgment, was the property of the complainants worth; that is, what was its cash market value just prior to the construction of the improvement of the road?

A. Well, all that I would have to guide me would be the sales of the best property that was sold, and still that wouldn't be a very correct guide, because this property that we are speaking of now was low bottom land, first bottom ground, and there was some of that ground good only for the purpose that they used it; that is, for an ice pond, or for agricultural purposes; I wouldn't consider it worth any great deal for building purposes, and some of it was; but I think as to the value, judging from this other property, about $600 of $700 an acre would be all it would be worth.

Counsel for defendant objects to the descriptive portion of the answer, and also to the complete answer, for the reason that the value stated has no reference to the value of the property at the time the improvement was made.

Q. Assuming that the land covered by the assessment in question in this suit, was a strip 1119 feet long, 250 feet wide or deep, and amounted to 6.42 acres, what would that strip we worth—what was

that strip worth in cash just before said improvement of the road was made?

A. Running back 250 feet?

Q. Yes, sir.

A. Well, I suppose it would be worth a little more than the whole tract by it fronting on the street.

Q. You mean it would be worth more than the whole tract, or more per acre?

A. More per acre than the whole tract.

Q. How much in dollars and cents?

26 A. Well, I suppose about a thousand dollars.

Q. Now, then, give in your judgment what the whole tract was worth immediately after the improvement was completed?

A. The whole 40 acres, do you mean?

Q. Yes, sir.

Answer objected to by counsel for defendant for the reason that the entire tract is not in question, the assessing district being limited to 250 feet.

A. I am to answer what I think the whole tract was worth?

Q. Yes, sir.

A. Well, I suppose it would likely be worth about $200 an acre or more.

Q. More than what?

A. That what it was before; no, I don't think it was worth more—I don't think it was worth more than $100 an acre, that is the whole 40 acres, if it was worth that.

Q. $100 an acre what?

A. More after it was done that before, if it was that.

Q. Now, what, in your judgment, what was the strip consisting of 6.42 acres, described in the preceding question, worth in cash after the improvement was finished?

A. That improvement, I think, benefited some of it, and I think others it wasn't any benefit to It damaged it; that is, by the change of grade—by the change of grade.

Q. The question is, how much was the strip worth?

A. Well, I don't think that it benefited it any more than $200 an acre, taken on the whole, after it was done than before it was done.

Q. Do you know the length of the whole improved road, or about how long it was?

A. Why, I have always understood about 5000 feet. I think maybe 4900; somewheres in the neighborhood of 5000 feet, I have always understood. I can not tell exactly.

Q. Where is the west end of the improved road?

A. Why, at the bridge that crosses Alum creek.

Q. Now, I will ask you whether there is any hill along the road—improved road, and if so, where it is located?

A. Yes, there is on my property.

Q. How far is the hill from the west end of the improved road, or the Alum Creek bridge?

A. Well, there is 1100 and some feet—well, I suppose it is about 14 or 15 hundred feet from the bridge from where you strike the hill; 11, I think—about 14 or 15——

Q. What is the front of that property in feet?

27 A. 935½.

Q. Now, what is the situation of the property fronting on this improved road from the top of the hill and east of your property, to the other end of the improved road, with reference to the grade of the road?

A. Well, what you might call a hill there is on my property, and as you go east the grade—that is, the grade gets less, and it continues getting less, until you go to the circle; I think there is a little raise there right at the circle, and then if you go east why, there is scarcely any cut at all. That is on the Beningnus and Miller property. In that syndicate property I think it would run from 5 to 6 feet of a cut to 2 or 3; and the other property as you go east it gets less.

Q. Are you now describing property on one side or both?

A. Both sides; the syndicate property.

Q. How much of the 5000 feet at the time the improvement was made was owned by what you call the syndicate?

A. Why, I have understood, always, that it was pretty near half—not quite. I should think that there would be probably 23 or 24 hundred feet, that it is taking a rough guess; I have no measurements to go by; but it is nearly one-half, I always understood.

Q. What, in your opinion, was the difference in the special benefit derived by the syndicate's property from the improvement, and the special benefit derived to the property of these complainants?

Question objected to by the counsel for defendant.

A. By the change of grade from the old road before the improvement commenced. It seems to me that the syndicate got all the benefit, or nearly so, in that—nearly all the benefit—all the special benefit; that is, by the change of grade.

Answer objected to by counsel for defendant, because it is not responsive to the question.

Q. What kind of a road is Broad street, or the Columbus and Granville road?

A. What kind of a road was it?

Q. Yes.

A. Before the improvement?

Q. No, since the improvement. Is it a general thoroughfare, or is it an obscure road?

A. It is a very general road; one of the most public roads that come into the city.

Q. How much is it traveled?

A. It is traveled a great deal—a great deal. I could not

28 tell the amount of people that goes along it. It is a very public road.

Cross examination.

Examined by Mr. J. W. DYER:

Q. Mr. Morrison, what was the property belonging to the complainants used for prior to the date of the improvement of East Broad street?

A. That is immediately before?

Q. Give us your answer.

A. Why, they use it for an ice pond, and they farm it some.

Q. I understand you that it was used in the winter time for an ice pond?

A. Yes, and for a levee around it.

Q. And in the summer time they cultivate the soil?

A. Yes.

Q. What ice company, if you know, uses that for that purpose?

A. There is only one that I know, the Alum Creek Ice Company.

Q. Who, if you know, composes the Alum Creek Ice Company?

A. I have always understood that at that time Dr. Shepard, Mr. Carr and Mr. McLeish.

Q. The three complainants named in the case?

A. Yes, that is what I have always understood.

Q. I will ask you, Mr. Morrison, whether or not you ever instituted any proceeding in any court to restrain the collection of the assessment levied against your property, which abuts upon this improvement?

A. Yes, sir.

Q. In what courts?

A. Why, in the circuit court.

Q. Franklin county?

A. Yes, sir.

Q. State whether or not the trial of the issues involved in that case has been had in that court?

A. Yes, sir.

Q. State whether or not all the complainants in this case were witnesses in that case, to the question of benefits to your property?

A. Well, Dr. Shepard was, and I believe Mr. Carr, but I don't know whether he testified or not, but I guess not.

Q. Were you present along this improvement at the time it was made?

A. Why, I seen it a making.

Q. Had you any conversation with either of complainants
29 in this case prior to the time this improvement was ordered, or during the time it was being constructed?

A. I don't think I had; I have no recollection of it.

Q. Your property lies east of the property of complainants?

A. Yes, sir.

Q. On which side of the improvement?

A. On the same side.

Q. On the south side of the improvement?

A. Yes, sir, on the south side.

Q. Do you make up your judgment as to the special benefits to the property of complainants in any part from your judgment of the special benefits to your own property?

A. No, I don't think that I did, because they are not exactly situated alike.

Q. What opinion or knowledge had you as to the value of the property of complainants prior to the making of this improvement?

A. I think I answered that, Mr. Dyer, that is, by saying that all I could go by was the property that was sold in that neighborhood.

Q. Mr. Morrison, how far do you live from East Broad street, or did you live, at the time this improvement was made?

A. About five or six miles.

Q. Were you specially acquainted with the values of property along East Broad street prior to the time this improvement was made?

A. Only by the sales that I heard of.

Q. Did you not hear of these sales subsequent to that time?

A. That is before that time?

Q. That is not answering my question. I mean subsequent to the making of the improvement?

A. Yes, sir; I heard of these sales.

Q. Now, prior to the time of the improvement, did you have any opinion or special knowledge as to the value of property along this improvement along East Broad street?

A. Before the commencement of the improvement?

Q. Yes.

A. From the sales that took place—I heard of these sales, what the property was selling for along Broad street.

Q. What sales have been made before the improvement was made that you now recall?

A. Why, there was lady by the name of Mrs. Draut, I believe.

30 Q. What did she give?

A. I understood a thousand dollars an acre.

Q. To whom did she sell?

A. To this syndicate.

Q. Who else?

A. Why, Mr. Denmead.

Q. To whom did he sell?

A. To this syndicate, I believe.

Q. Who else?

A. I think Mr. Wall and Mr. Calendare.

Q. To who did they sell?

A. To this syndicate, I understood.

Q. Give the price?

A. I heard a thousand dollars an acre.

Q. Do you know of any other property selling?

A. Why, yes, Mr. Loop.(?)

Q. To whom did he sell?

A. To Mr. Tracy and Powell, I think.

Q. What consideration did they give?
A. A thousand dollars an acre, I understand.
Q. All the sales you have now spoken of were made to the syndicate, or to Mr. Powell and Tracy?
A. Yes, all I can call to mind.
Q. The syndicate you refer to is what is known as the Philadelphia syndicate?
—. ——.
Q. Do you know whether or not that syndicate has subdivided the properties which they bought?
A. Yes, sir; I have understood so; I have seen the plat of it.
Q. Do you know of any sales that were made prior to the syndicate purchases?
A. It seems to me that Mr. Willis sold to somebody. Probably it was to Wall and Calendar; I am not positive about that.
Q. What Willis is that?
A. That is where Tallmadge lived.
Q. What did he give for his land?
A. I heard $600.
Q. An acre?
A. Yes, that is what I heard.
Q. Do you know of any other sales?
A. Yes, I think that there was the Ruhl sales.
Q. To whom did they sell?
A. I think to the syndicate.
Q. What did they get?
A. Why, I heard $1200.
Q. An acre?
A. I can't tell; it is only hearsay.
31 Q. What other sales?
A. That is all I call to mind.
Q. Mr. Morrison, if you know I wish you to state what was the market value of land in the vicinity of this improvement per acre prior to the purchase of what is known as the Philadelphia syndicate?
A. Why, I haven't heard of any being sold; I believe I can only think of this land of Willis'. There might have been some, but I can't think of them now.
Q. Well, if you know you may state what was the market value of land in the vicinity of this improvement per acre from the years '85 to '87 and '8?
A. Well—'85—I can't tell what year that Willis sold.
Q. I am not asking for any particular sale. I am asking for your judgment of the value.
A. I don't think I knew of any but the Willis property——
Question read.
A. Well, in '85 land in that neighborhood was rather dull—in '85, and I have nothing to go by, except that Willis property, and I can not tell what year it was sold in, but somewheres between '85 and '88.

Q. Would you say that $600 was a fair market value per acre for the property in the vicinity of this improvement between the years '85 and '88?

A. Yes, along about that I think that would be.

Q. Now, from '88 on to '91 and '2, what would you say was the fair market value of the property per acre in that vicinity, in the vicinity of this improvement?

A. Well, the only thing I have to go by——

Q. Give me your judgment?

A. Well, I will tell you, Mr. Dyer, my judgment is this, as the thing has proved since——

Q. No, no——

(Witness continuing:) I will say what a thing sells for that is what it is worth.

Q. I want your judgment in the matter.

A. I suppose about a thousand dollars, that is the only way I can answer the question.

Q. To what do you attribute the increase in value of the land in the vicinity of this improvement per acre from 1888 to '91, over the value from '85 to '88?

A. Well, there was what I call a craze come over the people—I can't call it by any other name.

Q. What caused the craze?

A. Well, I can't tell anything else only this syndicate buying this land, and every body seemed to go wild over that. I con-
32 tended at the time that it was a good deal of a bubble. I suppose I could find a dozen people to whom I expressed my opinion in that way.

Q. Was the improvement of Broad street, East Broad street, contemplated at the time the syndicate purchased this property?

A. Not that I know of; if it was contemplated it was in their mind, because I don't think anybody else did know, as I am interested in that property—in the property along that road.

Q. When did you first hear of the improvement of East Broad street?

A. Why, some time after—I can't tell the year the syndicate bought, but I think it was about '88.

Q. Wasn't that about the time they were making these purchases?

A. Which, the street contemplated?

Q. Yes; wasn't the improvement of East Broad street talked about by the property owners along East Broad street about the time these purchases were being made?

A. No, sir; not that I heard of. Now, I will give you, if you want me to, my reason for that.

Q. I don't want your reason; I ask for the fact.

A. I didn't hear of it.

Q. Mr. Morrison, wasn't East Broad street the only means of access to the lands purchased by this syndicate, and to the lands of he complainants herein at the time this improvement was made?

A. It was the only public road that I knew of.

Q. Were there any bridges across Alum creek at that time, except the bridge across Alum creek on East Broad street?

A. No, there wasn't.

Q. The syndicate that you spoke of purchased property on both sides of East Broad street, didn't they?

A. Yes, sir.

Q. Since East Broad street was improved have you known of any sale of property abutting on the improvement?

A. Why, I have heard of two lots being sold, and this property of Markeson's being sold.

Q. Which lots do you refer to?

A. Why, it seems to me one bought by Tracy, and one by Van Horn.

Q. If you know you may state what Tracy paid for his lot?

A. Well, I have understood $70 or $75 a front foot.

Q. What was the purchase price of the Van Horn property?

33 A. About the same, it was either $70 or $75, I am not positive.

Q. These lots are located east of complainants' property?

A. Yes, sir.

Q. On the same side?

A. No, sir; on the north side.

Q. Do you know of any other sales?

A. On that street?

Q. Yes, sir.

A. No, nothing only this property of Markeson's; sold at public sale, I understood.

Q. Wasn't that recently?

A. Yes, that was recently.

Q. Do you know of any other property selling on adjacent street-?

A. Only by hearsay.

Q. What did you hear on that subject?

A. I heard—I understood that there was other lots on cross streets sold.

Q. Well, what prices per foot front?

A. $1500, I understood; their lots was 100 feet front, that would make $1500.

Q. Do you know the size of these lots?

A. I understood 100 by 250—100 feet front, 250 feet deep.

Q. What fraction of an acre would that make?

A. About two-thirds.

Q. The property sold on adjacent streets, if I understand you, at the rate of about $2,000 per acre?

A. Yes, sir; about that way.

Q. Have you known of any other sales of property on Broad street, on East Broad street abutting immediately in the street for less than $75 a front foot?

A. That is all I have heard of—these two lots being sold.

Q. Do you know of any property being sold on adjacent streets for less than about $2,000 per acre?

A. I haven't heard of any, no; I haven't heard of any being sold only these lots.

Q. Do you know whether or not the persons who purchased the lots on adjacent streets assumed the assessment, if any, on their property?

A. That is what you might call back lots; no, I think not; I understood only on Broad street. I understood the syndicate paid for the street.

Q. In other words, the sales made of the lots on Broad
34 street, you understood the syndicate paid the assessment and the purchaser took the lot free from the assessment.

A. That is what I understand.

Q. Mr. Morrison, would you say that the purchase price of the lots abutting on Broad street was the fair market value of the property at the time these purchases were made?

A. Well, they were sold for that is all that I can say.

Q. I want your judgment now.

A. My judgment would be that they were sold at two or three times what they were worth.

Q. Is that your judgment now, or is it your judgment of the value at that time?

A. Why, my judgment at that time.

Q. A while ago you said in your examination in chief that you had no other means of determining the value of property on that improvement except the selling price. You gave it as your judgment that $600 was the fair market value in '85, and that $1,000 was a fair market value from '88 to '91, because property had sold during these periods for that amount. Now, why do you change your individual judgment as to the market value of property abutting on East Broad street when there have been no sales less than $75 a front foot?

A. Well, you're right; that would be the only judgment that I could give—that is, by the sales.

Q. Then, if I understand you, you say that, basing your judgment on these sales that $75 a front foot was the market value at the time these sales were made?

A. Yes—I have always heard it said whatever a thing sells for that is its value.

Q. You say that was the value of the property abutting on Broad street when these sales were made—75 per foot front?

A. In that way, by the sales.

Q. Well, you base your individual judgment on the sales made prior to the improvement by the selling price; now, then, do you base your individual judgment upon the market value subsequent to the improvement by the selling price?

A. Yes.

Q. And then you say that $75 a foot front was the fair market value subsequent to the improvement?

A. That was what it sold for.
Q. Is that your judgment, then?
A. My own judgment is that the property—that is my private judgment is that the property all sold too high.
35 Q. How did you change your private judgment after the improvement was made from the basis of the selling price, when you did not change your individual judgment of the value prior to the improvement based on the selling price?
A. My individual judgment, as I told you when it was selling for a thousand dollars an acre was too high; that was my individual judgment.
Q. I didn't so understand you. Isn't it a fact, Mr. Morrison, that a large part of your judgment as to the value of this property is based on your personal opinion as to the value of property on East Broad street?
A. No, sir; I could find plenty of people that I expressed my judgment then that this property—when it was sold—that it was too high. That is when it was sold for a thousand dollars an acre—that it was too high.
Q. You were interested in this property, were you not?
A. Yes, sir.
Q. Before this improvement was made, or about the time it was being made, did you have any offers to purchase the property, or did you know of any pretended purchases in which you were interested?
A. Why, yes; John Mitchell asked me if I wouldn't—he was the agent or acted as such, for the syndicate—and he wanted me to ask—to make Mr. McCalla an offer for him, and I done so.
Q. State what that offer was?
A. $1200 an acre.
Q. What did you do?
A. I made him the offer.
Q. Well, tell us about it.
A. Well, I told him that I would make him an offer, and he said that if I had a mind to I could retain a third interest in it, or whatever I had a mind to.
Q. McCalla said?
A. No, John Mitchell. I told him that I would make McCalla the offer, and I done so. I met John Mitchell——
Q. I am interested in what you said to McCalla.
A. Well, I told him that I had come to make him an offer for his land, and he said All right, what is it? And I told him.
Q. What did you tell him?
A. I told him $1200 an acre.
Q. That is for all of his land?
A. All of his land.
Q. How many acres?
A. 45.
Q. How much of his land abutted on this improvement?
36 A. 935½ front feet.

Q. How far did it extend back from the improvement?

A. Why, I think 137 rods—that is one thing you have to consider—about 137 rods.

Q. This was including the price for the entire tract?

A. The entire tract.

Q. Now, what did he say?

A. Why, he said, why no; he says I have been offered he says—well, I think it was $1500 a front foot—$1500 an acre. Mr. Keys had offered him, I think he said $1500 an acre, and says he, I would hate to price it to you at $2,000. So, of course, I had no more to say.

Plaintiffs' attorney objects to conversation with McCalla, as hearsay.

Q. I will ask you to state, Mr. Morrison, if it is not a fact that Mr. McCalla had an offer of $1500 an acre from Mr. Keys for his property along this improvement, and consulted with you as to whether the sale had better be made?

A. No, sir.

Q. And if you did not advise McCalla at the time not to sell the property?

A. No, sir.

Q. Did you urge McCalla at the time you talked to him and made him the offer of $1200.0– an acre to accept it?

A. No, sir; because when he said that he would hate to price it to me at $2,000, I thought it wasn't worth while to urge the matter any further.

Q. About what time—give us the date of the conversation now that you had with John Mitchell, and also the date of the conversation with McCalla?

A. Why, I seen him nearly every day.

Q. What was the date?

A. I could not tell you.

Q. Was it before the improvement was made?

A. It was *the* before the improvement was made.

Q. Had the Philadelphia syndicate at that time been making purchases?

A. There had been but one.

Q. Was this improvement then in contemplation?

A. When they were making this offer?

Q. Yes.

A. I could not tell whether it was in contemplation or not; but I do say this, that it was not commenced, because I drove out on the roads on my way home.

37 Re-direct examination.

Examined by Judge PUGH:

Q. You said to Mr. Dyer that the lots that were sold on Broad street—that were located south of Broad street—for $1500 a foot front, that was $2,000 an acre.

A. I suppose that would make it something like that; I don't know that exactly.

Q. I will ask you to make the calculation; isn't it nearer $1500 an acre?

A. I didn't calculate exactly.

Q. Did you hear of the sale of the Stansberry property after the improvement was completed?

A. There was Stansberry property sold, but I could not tell whether before or after the improvement was completed; I could not tell you; and I forget, too, there was some colored people that had a piece of land that the syndicate bought; I could not tell.

Q. That was before the improvement?

A. That was before.

Q. How much did they pay for?

A. I understood a thousand dollars an acre.

And also WALTER H. MARTIN, a witness produced on behalf of plaintiff, who, being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give your name, occupation and residence?

A. Walter H. Martin; real estate and loan agent; 69 Miami Ave., Columbus, Ohio.

Q. How long have you lived in the city of Columbus?

A. Thirty-six years and three months.

Q. How long have you been engaged in the real estate business?

A. Twelve years and three months.

Q. Are you acquainted with the property situated on East Broad street, east of Alum creek, on the south side of the street, and abutting on the road, and owned by Dr. Shepard, Mr. McLeish and Mr. Carr?

A. The ice property there you mean?

Q. Yes.

A. Yes, sir.

Q. How long have you been acquainted with that property?

A. About thirty years, pretty nearly.

38 Q. Are you acquainted with the improvement of Broad street, east of Alum creek?

A. Yes, sir.

Q. Do you know what kind of an improvement it was?

A. Yes, sir.

Q. Do you know about the time that it was made?

A. Why, I think '89 or '90.

Q. I will ask you if you are acquainted with the values of property in that immediate vicinity prior, and also after the improvement was made?

A. Why, I know what property sold for previous to the time, or about the time that it was made.

Q. Do you know how this property of these complainants was situated as to the road after the improvement was completed?

A. Yes, it is very much lower than the roadway. Is that what you mean?

Q. That is what I mean. I will ask you what, in your judgment, Mr. Martin, that property, assuming there were 40 acres of it, and that it had a front of 1119 feet on the street—how much it was worth in cash just prior to the construction of that improvement?

A. That is a question that it is not possible to answer probably—definitely, at least.

Q. Haven't you any opinion as to what it was worth—any judgment? I am asking for your judgment.

A. This particular piece of property, being as low as it is, at least most of it, if not all of it, and it would be a difficult piece of property to subdivide into lots, and for that reason it would not be worth nearly as much as the property a little further east, and higher, and for that reason it is difficult, or more difficult, to put a valuation on that property than it would be on the property that is higher, which is better adapted for residence property.

Q. Still, haven't you an opinion as to what it was worth in dollars and cents prior to the improvement?

A. Yes, it might be worth four or five hundred dollars an acre, maybe six hundred dollars an acre.

Q. Take a strip along the front of this property 250 feet deep or wide, and 1119 feet long, what was it worth in cash, market value, before the improvement?

A. Again, it is difficult to put a value on that property situated as it is. It might have been worth—it is almost impossible to state what that property was worth at that time situated as it is.

Q. Was the strip worth any more per acre than the whole of it was worth, before the improvement?

39 A. Yes, it probably was.

Q. How much more?

A. Per acre?

Q. Yes.

A. I could tell better if I knew what it would cost to fill it, but I have no idea what it would cost to fill the ground.

Q. I am asking before the improvement—before anything was done.

A. Well, previous to the improvement there, there had been a demand for real estate which gave this property a fictitious value, a value that I don't believe was the real value, and there was only one sale of lots, as I understand it out there, one or two, either then or afterwards; there were acreage sales there running from a thousand dollars up, but this property being low property, was not in the market at these prices; it wasn't worth that to the people who were buying, and it is a question as to what its value was—whether it was worth four, five or six hundred dollars an acre. It would largely depend upon what it would cost to fill it so it could be subdivided into lots.

Q. Can you give an opinion as to what the same strip was worth

after the improvement was made? I mean immediately after the road was improved by the asphaltum pavement and side drives?

A. It would be very difficult work because there has never been any sales out there, being low ground as it is.

Q. If you have any judgment whether based on sales or simply your judgment, I wish you would give it?

A. It is very difficult to base values, without there are sales somewhere in the vicinity. There has been no demand whatever for that property on Broad street.

Q. You knew of sales after the improvement was made on the hill?

A. Yes, that is a different character of property.

Q. Considering the character of that property, and comparing the character of this property with that, or taking the selling price of that property, what, in your judgment, was it worth after the improvement was made?

A. I should suppose, after the improvement was made, based on sales made at that time, that property might be worth $40 or $50 per foot front.

Q. Considering the differences between the characters of the property?

A. Simply estimating what it would cost to fill it so that
40 the lots would stand quite a little distance above the roadway.

Q. What properties were sold after the improvement was made?

A. The property that was sold to Mr. Tracy, or Col. Patton, I don't remember which, they both owned the property; and the Van Horn property.

Q. What was the size of their property?

A. I think it was 100 feet lot, sold at $7500. $75 a front foot.

Q. Two lots?

A. I presume it was, two 50 foot lots fronting on Broad street.

Q. Do you know the depth of the lots?

A. I think 175 feet.

Q. What about the sale of the Stansberry property?

A. That property is some distance further out, and if I remember correctly sold for $1100 per acre.

Q. You mean it is east?

A. Quite a distance east of the Tracy lots.

Q. It is still along this improved road?

A. Yes, it is the east tract of property that was bought.

Q. On the north side?

A. Yes, sir; running up to—or at least the Stansberry property, as I understand, runs up to the Cassidy road.

Q. How many feet altogether?

A. I don't remember.

Q. 557 feet, or do you know?

A. I don't know; I never did know.

Q. How much was the grade of the road above this property of the complainants after the improvement was finished?

A. I never measured it, and I don't know.

Q. I will ask you in your judgment, what special benefit was derived to that property from the improvement?

Question objected to by counsel for defendant for the reason that it is asking for a conclusion.

A. I believe that the entire property was—the property east of Alum creek was benefited to a certain extent by the improvement, but it seems to me it was a very great mistake to put down as expensive a road as that was. A very much less expensive road would have benefited the property to the same extent, I think. Or if not so much, very nearly so.

41 Cross-examination.

Examined by Mr. DYER:

Q. You spoke, Mr. Martin, of the Stansberry property. At the time of the sale that property was not in lots, was it.

A. No, in acreage.

Q. And the price you named was for the property in the whole, or per acre?

A. It was a divided interest of the property they retained, I think, one-half of what they held.

Q. Do you know how deep it was?

A. No, I don't.

Q. It was more than the depth of an ordinary lot, wasn't it?

A. It was probably a thousand or more feet in depth.

Q. The price that you named had no reference to the front foot on Broad street?

A. No, sir.

Q. You consider the property immediately abutting on Broad street as of more value than you do the property extending back of the Stansberry residence?

A. Yes, there is no question but what Broad Street estate is worth more than lots in the rear.

Q. You spoke of the property of complainants being worth four, five or six hundred dollars prior to the improvement as it then stood; what was it a front foot?

A. If 1100 feet, and you figure per front foot, it would give you it quicker.

Q. You give the estimate front foot.

A. That was simply for a certain depth.

Q. For a certain depth for a front foot. You did not give it per front foot.

A. I qualified my statement with reference to the value at that time by basing it on what it had been selling for.

Q. Basing it on the same basis gives it by the front foot, what you consider it worth before the improvement was made—so we can get at it.

A. You mean just previous and during that time?

Q. Yes, give me that.

A. Well, there was no marked difference in property per foot front on Broad street at that time, so far as I knew about it.

Q. You gave us an estimate at four to six hundred dollars per acre prior to the improvement; can not you do that in frontage—put that in front feet in your judgment?

42 A. I don't believe it is possible to do so, because there was no demand for any land there in that way previous to that boom and it is impossible to say what 250 feet lying in that hollow would have been worth at that time.

Q. Your estimate was that the 250 feet abutting on this improvement was worth at least four to six hundred dollars per acre.

A. Running back through the rear, yes.

Q. What would you say as to the 250 feet per acre prior to the improvement?

A. I would say that the Broad Street frontage there would be worth anywhere from $800 to $1200, possibly $1500 per acre.

Q. Before the improvement?

A. Before the improvement.

Q. Well, now, what after the improvement? Give us that.

A. I gave that.

Q. 40 or 50 per foot front?

A. Yes.

Q. Now, Mr. Martin, what was the property belonging to complainants worth per acre before the boom as you call it, say from '85 to '88?

A. I should think it would have been worth $200 or $300 an acre.

Q. Now, what do you estimate it per acre after the boom, and after the improvement was made, after the boom and about the time the improvement was made?

A. You mean previous to the time the improvement was made?

Q. During the boom—the improvement was made in '90.

A. I should think that the property might have been—the market value, considerably more than 2 or 300 per acre previous to the boom, but in my judgment that land is not worth to-day——

Q. No, that won't do; I am not asking your judgment to-day—your judgment in view of recent occurrences, or anything of that kind, but as you are acquainted with the market values prior to the boom and during the time this improvement was made?

A. I understood I was answering that; I am giving you my judgment.

Q. Let us confine ourselves to that period, leaving the period subsequent to that time out of consideration. You can always look back, you know. I want to know, prior to the boom, your judgment of the value—prior to the boom, of the property of the complainants?

43 A. I think I have given that—from $200 to $300 per acre.

Q. What, in your judgment, was the market value of the

tract, of this same property, during the boom, and during the time this improvement was being made, up to the time of its completion, in October, '91?

A. Why, I have practically answered that question—I believe it was worth from $400 to $600 per acre.

Q. Judging from what their property sold per front foot was the property per front foot belonging to complainants worth over $40 to $50 per front foot?

A. It might have been worth about $40 per foot front—simply an estimate on what it might cost to fill it up.

Re-direct examination:

Q. What did you say was your opinion—your opinion is not what?

A. I wish to say that I don't really believe that because a man paid $75 per foot front for that 100 feet, the land in that neighborhood would be worth $75 per foot front; in my judgment, and going on that basis, I don't believe it was worth that; I don't think that that which was sold was worth $40 per foot front.

Q. You mean the complainants' land?

A. Yes, in the condition it was in. But it is difficult for me—for any man to state what that property is worth, or was worth in so many dollars at that time. That is what I mean to say, and I was simply basing my opinion on what had been done by some one else, just using a basis upon which values are placed.

Q. You said you did not know the front of the Stansberry property—how many feet there were?

A. No, I don't.

And also CHARLES MCLEISH, a witness produced on behalf of plaintiff, who being first duly sworn, testified as follows:

Examined by Judge D. F. PUGH:

Q. Give us yonr name, residence and occupation?

A. Charles McLeish; Mifflin township; ice man.

Q. Are you one of the complainants in this case?

A. Yes.

Q. What proportion of the land which is—on which the assessment is ordered, do you own?

A. One-third.

44 Q. Who owns the other thirds?

A. Dr. Shepard and Leonard Carr.

Q. Do you mean in the suit I am asking about?

A. Yes, sir.

Q. Since the suit was brought has there been any change in the ownership of the property, and if so, what is it?

A. Yes, Leonard Carr sold out.

Q. To whom?

A. To Thomas McLeish and Joseph Busch.
Q. What relation is Thomas McLeish to you?
A. My son.
Q. You had no interest in that purchase?
A. None whatever.
Q. What use, or uses, have you devoted this property to since you owned it?
A. Ice purposes only.
Q. No farming?
A. No, sir; they garden it some, a little, but I use none of it and get no benefits from it.
Q. I will ask you whether you signed the petition for the improvement of the Columbus and Granville road in front of this property?
A. To my best recollection I believe not. I won't say positively, but I think I didn't sign it.
Q. Do you know whether it was signed by either Dr. Shepard or Mr. Carr?
A. I think Dr. Shepard signed the petition.
Q. For himself or all three?
A. All three; I don't believe I signed it, but I won't say positive.
Q. If he signed for all three it was with your authority?
A. Yes, sir.
Q. I will ask you what in your judgment was the value of that property prior to the construction of the improvement of this road in front of it? First, of the whole tract?
A. I should think 4 or 5 hundred dollars.
Q. Four to five hundred dollars what—per acre?
A. Per acre as a whole.
Q. What was the strip along the front of it 1119 feet long, and 250 feet worth in cash prior to the construction of the improvement?
A. Well, I should think not over seven or eight hundred dollars.
Q. What, in your judgment, was the whole tract worth immediately after the improvement was completed?
45 A. Putting that as a whole?
Q. Yes, first as a whole, I asked.
A. I don't know hardly how to answer that question.
Q. I am asking now the value of the whole tract after the improvement?
A. I should say $100 an acre. It is wild, of course; we have never had a front foot property there.
Q. Do you mean it was worth $100 an acre more after the improvement, than it was before?
A. Yes.
Q. I will ask you what, in your judgment, was the cash market value of the strip I inquired about, after the improvement?
A. I would have to admit it was worth more, but I can not tell you how much.

Q. How much, in your judgment, in dollars and cents?
A. How much more, or for the acreage?
Q. You can give it in the abstract, or by comparison.
A. Say one thousand dollars an acre after the improvement.
Q. Do you mean it was worth one thousand dollars more after the improvement than it was before?
A. Yes, a thousand dollars per acre more after the improvement. Seven or eight hundred dollars per acre before, and one thousand dollars after.
Q. What was the grade of this property as compared with the grade of the road or street after the improvement was finished?
A. They raised the street—raised the fill on that property probably 18——
Q. Along the 1119 feet?
A. Nearly so, to the east line, and probably past it.
Q. And how much was the grade of the street above the level of the property?
A. I should think 10 or 12 or 14 feet.
Q. Was it that way along the whole front where the street was left?
A. Pretty much to the eastern line.
Q. I will ask you what, if anything, you and your co-owners did towards filling up this property with dirt.
A. We put in nearly 70,000 yards of dirt there at an expense of nearly $5,000, if not quite.

Question and answer objected to by counsel for defendant.

Q. For what purposes did you make this filling?

Question objected to by counsel for defendant.

A. They raised the road higher than it was, and it was considerably lower than before, and it was necessary to have that much dirt.

46 Answer objected to by counsel for defendant.

Q. Do you know how much has been paid on the assessment?
A. I don't.
Q. Do you know how many acres there would be in a strip 1119 feet long, and 250 feet wide or deep?
A. I believe about 6½ acres.
Q. What sort of a highway is this on which this property abuts?
A. It is asphalt and has two side drives.
Q. To what extent has it been traveled since the improvement was made?
A. It is a very prominent thoroughfare, traveled considerably.
Q. Used by people of the city and country both?
A. Oh, yes, sir.

Cross-examination.

Examined by Mr. DYER:

Q. Mr. McLeish, of your own judgment do you know whether or not there was any claim for damages made to the board of county commissioners of Franklin county on account of the raise of grade, or change of grade on account of the construction of this improvement?

A. I am not familiar with anything.

Q. Did you ever make any claim for damages on account of the change of grade?

A. We did at the time, but did not succeed in doing anything.

Q. Did you file any papers?

A. No, sir.

Q. With the county surveyor?

A. No, sir, only in a verbal way so far as I am concerned.

Q. You never understood of any claim being allowed on account of or by reason of the change of grade?

A. I didn't only in a verbal way.

Q. Prior to the time this improvement was made, what was the extent of the grade in front of your property?

A. That is by the pond?

Q. Yes.

A. Ten or twelve feet, I should judge.

Q. It has a fill on each side?

A. Yes.

Q. It runs through a fill and water will get on to it. What was the increase?

A. About two feet; they raised the grade of it.

47 Q. They made the improvement and raised the grade of it about two feet?

A. Probably that.

Q. There was no material injury?

A. They raised the road that much.

Q. In raising the grade two feet you had a grade of 16 feet?

A. Had a grade of ten or twelve feet, and they raised it two more.

Q. Grade of ten or twelve feet, and they raised it to fourteen?

A. About that.

Q. That was the only change made?

A. They refilled it that much, in my opinion.

Q. Did Alum creek overflow that grade as it existed before the improvement during times of high water?

A. Not to my knowledge.

Q. What use, if any, did you make of that embankment?

A. Harvested ice on the enclosure there.

Q. What use did you make of this land before this improvement was made?

A. Didn't use it at all, except for ice. We did when in the ice business.

Q. Did you use the embankment that was made by this road as an embankment for this pond?

A. The bank that was there was allowed to remain, and afterwards we filled in over 75,000 yards of dirt.

Q. Then you did use prior to the improvement, the bank to the road as a bank to your ice pond?

A. Yes.

Q. Since that time you have continued to use it?

A. No, sir, we made our own bank.

Q. That was the extension of this bank?

A. Yes, sir.

Q. Up to the time you made your own, you used this bank, did you?

A. Yes, sir.

Q. How much of the fill did you make?

A. 250 feet.

Q. You filled up the property 250 feet from the Broad Street improvement?

A. Yes, sir.

Q. Did you fill it to the full height of the grade of the street?

A. No, sir, it is not filled yet.

Q. How nearly filled is it?

A. It wants as much more as it has had.

48 Q. What do you consider—you said you considered the value of the property prior to the making of this improvement at what?

A. In the frontage or the acreage?

Q. By the frontage.

A. I said seven or eight hundred dollars an acre.

Q. That is the 250 feet?

A. Yes, sir.

Q. Now, have you ever had any offers to purchase this property?

A. Have I had any offers to sell the property?

Q. Yes.

A. No, sir.

Q. Had you any offers to sell at the time the syndicate was purchasing the property?

A. No, sir.

Q. Have you subdivided the 250 feet?

A. No, sir.

Q. Mr. McLeish, what difference in value is there—I mean on the 250 feet between your property and the property lying east as it is now continued?

A. That is a very difficult question to answer, as we never had a nibble for property beyond that place to place a value on it.

Q. If property is worth $75 a foot front east of you, the way you have your property now filled, isn't your property worth that much per foot front?

A. No, sir, it is not.

Q. Well, do you say that your property is worth less per foot than the property east of it?

A. Yes, certainly it is.

Q. How much?

A. It is impossible to tell, because it is very low land.

Q. I mean as it is now graded and filled?

A. It is not filled to the grade.

Q. Assuming now that you have filled it, Mr. McLeish, say that your property for 250 feet lies on an equal grade with the improvement, do you now say that your property is not worth as much as the property lying east of it per foot front?

A. It is not, because it is low.

Q. How much difference?

A. Well, I will place it on an average of $12000 per acre after it is thoroughly filled up. After the 250 feet is thoroughly filled, I believe it would be worth $1200 an acre.

Q. Are you speaking of the value of it now?

A. No, sir, after it is filled up. That is the question you put to me.

49 Q. Assuming you had made the fill equal to the grade in October, 1891, would you say now that your property was less valuable per foot front than the property east of it?

A. Certainly I would.

Q. What difference would you put?

A. Well, it is very low land after it is filled up.

Q. Give me in dollars and cents the difference in your property in that condition and the property east of it?

A. I could not do it—I could not put a value on it in that comparison. We never had front foot offers lots there.

Q. Give us the difference in your judgment in value, and your reasons for making it?

A. It is very low land, and for that reason it is only worth $1200 an acre, if it is that. I can't answer more intelligently.

Q. Mr. McLeish, you are a member of the Alum Creek Ice Company, aren't you?

A. Yes, sir.

Q. Is that a partnership?

A. Yes, sir.

Q. And it is the Alum Creek Ice Company that uses this land?

A. Yes, sir.

Q. You cultivate it in the summer time, don't you, and raise crops?

A. I raise garden truck, but I never realize anything from it.

Q. For the purpose of this improvement, who represented the Alum Creek Ice Company?

A. Why, Dr. Shepard, if I understand you right; I think the doctor signed some papers for it. I presume that is what you want to get. We were all there of course.

Q. This partnership owned this land?

A. Yes, sir.

Q. Then the signature of the Alum Creek Ice Company means Shepard, McLeish and Carr?

A. I don't know how it was signed.

Q. Well, if signed so there it would mean the three persons, Shepard, McLeish and Carr.

A. Yes, sir.

Q. If I understood you on your direct examination, Mr. Shepard had full authority for the partnership, and for yourself, at least, to sign different papers which he signed in connection with this improvement?

A. Yes, I should think that is right.

Q. I will ask you whether, individually, you at any time
50 made any objection to the construction of this improvement?

A. I don't remember that I did individually.

Q. Where did you live during the time it was being improved?

A. I lived a mile and a half north of here.

Q. Where did you put in your time?

A. In Columbus.

Q. Did you have any personal knowledge that this improvement was contemplated?

A. Yes, sir.

Q. Did you have any personal knowledge that it was guaranteed by the board of county commissioners?

A. Yes, sir.

Q. Did you have personal knowledge of its construction during the time it was being constructed?

A. Yes, sir.

Q. Were you on it and over it frequently?

A. Seen it very often, twice every week at least.

Q. Did you have knowledge at or about the time the assessment was made as to the amount of it?

A. I have the knowledge or information, that it would cost $6.00 or $7.00, is all I ever heard.

Q. When it was finally calculated and placed on the tax duplicate, were you aware of the amount?

A. No, sir, I was not.

Q. When did you first hear it was eleven dollars or thereabouts?

A. I could not tell that doctor pays the taxes and everything, and I could not—I never paid any special attention to it.

Q. He attended to the tax matters, did he?

A. He always has for twenty odd years.

Q. Did you know of the fact, Mr. McLeish, that the assessment was to be levied on the abutting property to the depth of 250 feet?

A. Yes sir.

Q. Did you at the time the improvement was made?

A. Yes, I was under that impression. That was my impression, yes.

Q. You knew it at the time it was ordered, didn't you?

A. Yes, I so understood it.

Q, You knew it was to be levied on the foot front, didn't you? On that 250 reet.

A. Yes sir.

Q. You have no objection or protest as to that method of assessing the cost for the construction of this improvement?

51 A. No, sir.

Q. You never made any objection or protest to the method of collecting this assessment until this suit was filed?

A. No.

Q. I will ask you to state, Mr. McLeish, whether or not you had knowledge that this improvement was to be made under an act of the General Assembly, passed March 31st, 1890, providing for the improvement of roads in this county outside of the city?

A. No, I wasn't familiar with the law.

Q. You say you didn't sign the petition—that is your best recollection?

A. That is my best recollection.

Q. Did you ever read it?

A. I don't think that I ever saw it.

Q. Mr. McLeish, you said in your chief examination that your son purchased a one-third interest in this property from Mr. Carr?

A. My son and Mr. Busch purchased Mr. Carr's interest.

Q. What is the age of your son?

A. Twenty-nine.

Q. Where does he live?

A. At Shepard's, Ohio, Franklin county.

Q. Is he a married man?

A. Yes, sir.

Q. And lives by himself?

A. Keeps house.

Q. He is not living with you?

A. No, sir.

Q. Had you any knowledge that your son and Mr. Busch contemplated purchasing the interest of Mr. Carr prior to the time that they did purchase his third interest?

A. A few days, yes, sir.

Q. Did you consult or talk with your son about the purchase?

A. I spoke of it in an ordinary manner.

Q. Did you know when the purchase was made, or the transaction, what the consideration was, etc.?

A. Yes, sir.

Q. I will ask you to say now if you knew what the real consideration for that purchase was, how much money didy our son and Mr. Busch pay to Mr. Carr for his third interest?

A. $10,000, I believe, to the company.

Q. For this third interest in this property?

52 A. For all the property that they own everywhere.

Q. What was the consideration given?

A. His interest in the ice business I am answering.

Q. What was the consideration for the third interest in this real estate?
A. Indeed, I don't remember; I don't know.
Q. Have you any knowledge on that subject?
A. No, sir.
Q. Do you know how the consideration for this real estate was figured?
A. No, sir.
Q. What other properties were there?
A. There was property in Fairfield——
Q. Real estate, do you mean?
A. Yes, sir, and personal properties.
Q. The ice plant, etc.?
A. Yes sir.

Redirect examination.

Examined by Judge PUGH:

Q. When did you make this fill, how long after the improvement was made?
A. Well, as fast as we could get the dirt.
Q. Within what time?
A. The same year.
Q. I will ask you whether you knew, before the grade of this road was made for the actual construction of the road, what it was going to be?
A. No, sir.
Q. Whether it would be higher than it was?
A. I did not; I was surprised when it was made.
Q. Your son and Busch were to pay $10,000 as the consideration for the interest of Car in this real estate and in their property?
A. Yes, sir, all properties pertaining to the ice interests.
Q. You don't know then what part of that consideration was to be paid for the one-third interest of Carr in the real estate on which this assessment was levied?
A. No, sir.

Re-cross examination.

Examined by Mr. DYER:

Q. Mr. McLeish, I hand you a paper marked "Exhibit B," and ask you to examine the signature of Charles McLeish, attached to that paper, and state whether or not that is your signature?
53 A. That looks like mine—my signature, is all I can say, Mr. Dyer.
Q. Well, is it your signature?
A. I could not swear to that, you know.
Q. Don't you know your own signature?
A. Certainly I don't know, couldn't somebody counterfeit my own

signature? I don't infer they did; that looks like my signature; I think it is my signature.

Q. I hand you, Mr. McLeish, a paper marked "Exhibit C," and ask you to examine the signature attached thereto of Charles McLeish, and state whether or not that is your signature?

A. That also I believe was signed by myself.

Q. I hand you a paper marked "Exhibit D," and ask you to examine the signature of the Alum Creek Ice Company, by C. McLeish, and ask you to state whether or not that is your handwriting?

A. That also looks like my signature. I repeat the same as I have in the other places. I don't know what it is about.

Q. It is about the sewer pipe.

A. The sewer pipe?

Q. Yes, sir. Did you write the words "Alum Creek Ice Company"?

A. I see that that was done by the same person that did the other writing.

Q. What have you to say as to its being your writing?

A. Why, I think I wrote it.

Q. Mr. McLeish, I will ask you to state whether or not you had authority to attach to this paper, or to any paper connected with this improvement, the name of the Alum Creek Ice Company?

A. I haven't the slightest recollection of ever conversing with anybody on the subject, so if I signed it in person, I did it of my own accord.

Q. You were one of the partners in the Alum Creek Ice Company?

A. Yes sir.

Q. As one of the partners of that company, you had knowledge of the construction of this improvement?

A. Yes sir.

Q. State whether or not one of the partners objected at any time to your act in signing the "Alum Creek Ice Company" to "Exhibit D"?

A. I don't think they objected; I don't know as they knew I signed it.

Mr. DYER: It is admitted on the part of the counsel representing defendant, that the papers marked "Exhibit B," "C" were
54 signed by Charles McLeish, and that the paper marked "Exhibit D" was signed by the Alum Creek Ice Company by C. McLeish. Further that said C. McLeish had full power and authority to sign the name of the Alum Creek Ice Company.

(Judge PUGH:)

Q. You were inquired about the consideration for the purchase of the one-third of the property from Leonard Carr by your son and Busch. Do you know what was the consideration for the $10,000 purchase price? Did you state all the consideration they received for the $10,000 purchase price?

A. No.

It was agreed by the counsel for plaintiff and defendant that Mr. Charles McLeish be excused and his son, Mr. Thomas McLeish, be called to testify.

THOMAS J. MCLEISH, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Your name?
A. Thomas J. McLeish.
Q. Are you the McLeish who, with Mr. Joseph Busch, bought the interest of Leonard Carr?
A. Yes, sir.
Q. In the property concerning which the assessment thereon is now in controversy in this suit?
A. Yes, sir.
Q. Have you the article of agreement showing the terms of the contract between you and Mr. Busch on the one side and Leonard Carr on the other?
A. Yes, sir.
Q. Is this the agreement (handing witness paper marked "Exhibit E")?
A. You mean the property that he sold, the price paid, the terms?
Q. The terms of the agreement?
A. Yes, sir.
Q. Is this the paper?
A. Yes.

It is agreed that a copy of this paper may be attached to the deposition of Mr. McLeish, instead of the original, which is done, and is "Exhibit E," and is now offered in evidence.

55 Cross-examination.

Examined by Mr. DYER:

Q. As I read this contract over, Mr. McLeish, there seems to be no stipulation as to the value placed on the one-third interest in the 39 acre lot. Can you state what value was placed—what value was agreed upon between you for this particular piece of property?
A. I cannot.
Q. How did you arrive at the consideration named in this contract?
A. Do you speak of the land particularly, now?
Q. No.
A. Well, simply like any other business transaction, figured the entire thing, and didn't consider the consideration incidentally at all.
Q. What figure did you place on these 39 acres?
A. I wouldn't state that now, that we put any figure on it.
Q. In making your estimate, and coming to an agreement be-

tween yourselves and Mr. Carr, you must have figured some particular value for this 40 acres of land.

A. I have no knowledge of that figuring at all; no particular figuring to bring it down to a fine point what that land was worth—it was for the whole thing, the ice privilege, the ice houses, etc.

Q. Isn't it a fact that you figured the land, this 40 acre lot, and the 10 acre tract near the reservoir, and the personal property belonging to the partnership on one side, and then deducted from the debts, mortgages, etc., of the Alum Creek Ice Company, and in that way arrived at the amount of the consideration which you were willing to pay Mr. Carr?

A. Yes, sir.

Q. If you did that, what was the estimate or value you placed on this 40 acres?

A. As I say, I didn't know there were any figures on arriving at that matter—that were put on that lot.

Q. What did you consider it worth at that time?

A. It is a very difficult thing; I could not answer it at this time. I don't know as I could tell, of course, we had opinions as to what the land is worth, but right now if you take what the land is worth—we figured up the assets and liabilities, and that is the basis on which we came to our conclusion.

Q. Then, after doing that you can make answer to my question—that is, what was the consideration of the 40 acres as part of the assets?

56 A. As I say I don't think we came to an actual conclusion as to what that land was worth, right down to the dollar.

Q. A rough estimate; what was it figured at? If nothing, say nothing; it was figured some way or the other.

A. I can't remember of the time that we agreed on exactly what that land was worth; we figured everything else but the land; of course that land was part of the assets, and we came to our price that way.

Q. In your deed, Mr. McLeish, you named $10,250 as the consideration for the property described in the deed. Is that correct?

A. Yes, but you find two properties in there.

Q. There are two properties, one piece consisting of about 40 acres, and another of about 10 acres, that is, a one-third interest in these two pieces. Now, how much of the $10,250 was considered for the 40 acres?

A. All but ten or twelve hundred dollars—that is for the land.

Q. Then, if I understand your answer, $9,000 would *the* about the consideration for the one-third interest which you received for the 40 acres, the consideration?

A. Let me look at the deed, please. Well, of course, you understand that on this piece of land there was an accumulation—an accumulated amount of ice, with other improvements, ice-houses and ice privileges, etc., and that was the principal thing we bought in order to go into the business. All was included in that—ice and everything else.

Q. Did the consideration then for the 40 acres include everything—the consideration including everything on it was approximately $9,000?

A. Was for all that was on it, horses, wagons, ice, ice-houses, and everything else. Of course we wanted that property, and felt it was all right, and we could get a good business there.

Q. In the deed I notice also that you assume all the unpaid street assessments pending against this property, for which Mr. Carr, your grantor, was liable, as a part of the purchase money. Did you know at the time what the amount of the street assessment was?

A. I don't know as I did, exactly, no, sir.

Q. Did you investigate, or cause to be investigated the tax duplicate of Franklin county, to determine the amount that was unpaid?

A. No, sir; I relied upon my father and Dr. Shepard for that.

Q. They told you?

57 A. I don't think it was ever mentioned; in fact, I never noticed the deed close enough to know that that was in it; but I knew that we would do anything that was right; that is understood.

Q. You understood, didn't you, at the time, that in addition to the consideration of $9,000, that you were to pay the unpaid street assessment?

A. Provided it was just, yes, sir.

Q. Well, was there any stipulation of that kind with Mr. Carr?

A. No, but we assumed these things pro and con—there were like settlements both ways that were assumed. We knew this was pending, of course.

Q. How much of the $9,000 did you consider personal property; that is to say, how much of this consideration was for ice, and ice-houses, teams, etc.?

A. It would take a few minutes to figure that.

Q. Make that estimate.

A. I would have to divide how much ice we had there and how much at Lakeside; we knew how much we had—I would have to figure it.

At this point the further taking of depositions was adjourned until nine o'clock Tuesday morning.

TUESDAY MORNING—Nine o'clock.

Met pursuant to adjournment, with same parties present.

And also EDWARD DENMEAD, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name, occupation and residence?

A. Edward Denmead, 153 Woodland Ave. President of the Art Tile Company.

Q. How long have you lived in Columbus?
A. I have lived here about thirty years.
Q. Where did you live before you moved in to the city? Did you live anywhere near the city?
A. In Marion township on Broad street?
Q. What is that road called?
A. Called East Broad street when I lived there—when I lived on it.
58 Q. It is sometimes called the Columbus and Granville road, isn't it?
A. Yes, sir.
Q. Were you acquainted with the improvement that was made by grading and asphalting the continuation of Broad street, or the Columbus and Granville road?
A. Yes, sir.
Q. Where did you live with reference to the improvement?
A. Well, I lived right on it—right on the improvement, right where the improvement was made.
Q. Where did that improvement begin, and where did it end?
A. It began at the east bank of Alum creek, and extended out to the Cassidy road.
Q. Do you know about how long it is in feet?
A. No, sir; I don't.
Q. Did you own property abutting on this improvement, right on the street?
A. Yes, sir.
Q. How much property?
A. I owned 50 acres.
Q. When did you move away from that property to the city?
A. About '89.
Q. Are you acquainted with the property which belong to these complainants at the beginning of this action?
A. Who are they?
Q. Doctor Shepard, Mr. McLeish and Mr. Carr.
A. Yes, sir.
Q. Where is it located with reference to the improved road?
A. It abuts on the improved road.
Q. At the east end?
A. It is on the south side of the improvement, and ends at the west end of the improvement.
Q. What kind of property is that with reference to the grade of the road before the improvement was made?
A. I think that before the improvement was made, if I recollect right, it was four or five feet below the road, before the improvement was made.
Q. I will ask you whether you were acquainted with the values of lands in that neighborhood—in that vicinity, before the new road was made, as you have described?
A. I was acquainted with the value particularly before the improvement was made.

59 Q. I will ask you what in your judgment was this property of the complainants worth in cash before the improvement was made, that is to say, a strip along the front of it 1119 feet long and 250 feet wide?

A. Well, Judge, to take the value of the very land we are speaking about—that land remaining so low—I think that land at that time for building purposes——

Q. For any purpose?

A. Well, I should think that land was worth about $700 an acre.

Q. I will ask you what in your judgment was the cash value of the same land immediately after the improvement was made, immediately after?

A. Well, I don't think the cash value was any greater.

Q. Greater than it was before?

A. Greater than it was before, no, sir.

Q. Why?

A. Well, there had been a fill made there, and in order to make that property valuable, as it was still lower, to make it valuable for building purposes it would have to be filled up considerably more.

Q. Is it filled enough now?

A. No, sir.

Q. For such purpose?

A. No.

Q. What was the relation between the surface of the property of the complainants, the grade of the property, and the grade of the street—the road, after the improvement was finished?

A. If I recollect right they made a fill there of about three feet.

Q. Do you mean that they raised the grade of the street or road three feet higher than it was before, than the property?

A. Yes, higher than it was before—higher than the property. That is my recollection.

Q. I will ask you to describe the situation of the property on both sides of the road, beginning at the east end of the improvement, and going as far as the McCalla property which is next to the property of the complainants, with reference to the grade of the street after it was finished?

A. Well, it was a fill, as I say, of about three feet, and there was quite a cut up to McCalla's.

Q. I am asking about the east end, beginning with the Stansberry property out there, not coming this way, but ending with the McCalla property—I want to know what the grade was there?

60 A. That grade was lower than it was after the improvement; they made a cut and made a fill.

Q. Well, about—is the property along there—along the distance of the improved road, higher or lower than the grade of the street?

A. It is higher.

Q. How much higher?

A. I should think the McCalla property——

Q. No, immediately east of the McCalla property.

A. My property when I lived there, the property that I left, was about 2½ feet, probably, above the grade of the old road, and after the improvement was made it was probably 6 feet. About that proportion, right along.

Q. I will ask you this question: What, in your judgment, was the relative special benefit derived from the improvement *by* the property of the complainants, to the property on both sides of the improved road, beginning at the east end of the improvement, and ending with the McCalla property?

A. Well, I think Dr. Shepard's property was benefited as much as the rest of the property, if there was any benefit at all done them—if the property was benefited at all by the improvement.

Q. Why do you say that?

A. In the first place the improvement was very high, cost a great deal more than it should—more expensive improvement than I think necessary, and the value of the property could not keep up with that improvement.

Q. Well, do you base your judgment that it was less benefit to complainants' property than it was to the property at the other end of the improvement?

A. My opinion is that they all suffered about alike; some of the property might have been a little more benefited, but this whole property was certainly decreased in value by the fill. At least I think so.

Q. Are you acquainted with the Stansberry property?

A. Yes, sir.

Q. That abuts the improved road, does it?

A. Yes, sir.

Q. At the east end?

A. East end.

Q. Do you know the distance of the front?

A. Well, now, if my recollection serves me right, they had about the same as my property, altogether about 800 feet.

Q. Isn't it 557 feet?

A. Well——

Q. What is your front?

61 A. 800.

Q. What kind of a road is this, Mr. Denmead, is it a general thoroughfare?

A. Yes, sir.

Q. How much traveled?

A. Well, there is a very considerable travel there, the market people—a great many market people come in there.

Q. About how many people of the community of this county and city were benefited generally by that improvement—by the improved road?

A. That would be a pretty hard question to answer. I could not answer that. I know there was a good deal of travel there, probably traveled as much as any road out of Columbus.

Q. And in addition to the general travel along it by people living at the other end of it, was there any other travel on it?

A. Yes, a great deal of pleasure riding on it.

Q. By whom?

A. By the citizens of Columbus.

Q. When this improvement was finished, what kind of a drive did it make for the class last named by you?

A. A very handsome improvement.

Cross-examination.

Examined by Mr. SEYMOUR:

Q. Mr. Denmead, would not the benefit to the property be greater as the price would be greater?

A. No, sir; I think not.

Q. Don't you think that a street that would cost $11.25 a front foot would make a 250 foot deep strip on it more valuable than an improvement that would cost $2.00 a front foot?

A. Well, probably; the difference there is pretty great. I think it would make some difference, although I think the improvement was entirely too expensive——

Q. Answer that question.

A. Do I think that a pavement that would cost $11.25 a front foot would make more valuable a 250 foot strip than a $2.00 one?

Q. Wouldn't it make a strip abutting on that improvement 250 feet deep, more valuable than a $2.00 improvement?

A. Why, under the conditions there, I don't think it would, sir.

Q. This is just abutting the corporation line of the city of Columbus, isn't it?

62 A. Yes, sir.

Q. It would be the next property, if any other property was annexed to the city, which would be brought within the corporation limits?

A. Yes, sir.

Q. Would be used for building purposes if building was done out that far? Now, you say that the value of the abutting property does not increase by reason of the increased expense of any improvement made there?

A. Oh, no, I don't say that. I think an improvement can be made that will enhance the value of the property; in this case I believe an improvement that cost $2.00 a foot properly done would have—the property would have—you would have realized just as much out of that as with the expensive improvement, I believe.

Q. We have a case of property along which there is no improvement; an improvement is put there that would cost $11.25 a front foot; do you mean to tell us that that don't make that property any more valuable?

A. I don't think it made that particular property any more valuable than one that cost $2.00 a front foot.

Q. Did that improvement make that property any more valuable in the market?

A. No, sir.

Q. Would it sell for one cent an acre more after the improvement was put there and paid for, than it did before?

A. Yes, I think it might sell for more.

Q. For how much more per acre or front foot?

A. I don't believe that property would sell for more—I don't think it would sell for over $100 an acre more.

Q. How much was that property, after that improvement was made and paid for—would that property sell for a foot front in '92?

A. If it was paid for in '92—well, sir, in '92 I don't think that that property could have brought over $800 an acre.

Q. What was the fair market value of that property per foot front in '92 supposing that property to have been paid for entirely?

A. Per foot front?

Q. Yes.

A. I can't tell—let's see; I think it would be worth about $800 an acre. There was 210 by 210 it runs back—200 feet makes an acre—I think that property would be worth about—I should think that that property would be worth—would be figured out 200 feet at $30 a foot—I would have to do a little figuring there; it is
63 250 feet deep, and 210 square feet to an acre, and I should think that that would be worth, estimating at the acreage—that property was worth after the improvement was made, about $800 an acre.

Q. I would like to get the front feet—give us the value per foot front after the improvement was made. That is in feet.

A. I don't know by feet.

Q. Mr. Denmead, wasn't that property fronted by that improvement mere acreage property, farm property, not a property used for lots and sold by the front foot?

A. Well, I never heard of Dr. Shepard's offering them.

Q. But the property along the improvement, I am talking about now?

A. Now, they were platted so, sir. I could only say that they were so platted, so figured by the foot front.

Q. There was no plat before the improvement was made, was there?

A. I had a plat of my property made, but never recorded.

Q. After this improvement was made—the whole property abutting along the improvement, was made valuable for platting and for sale by lots?

A. Yes, that is right.

Q. The improvement made it more valuable in that way, didn't it?

A. It was valuable before that, but I suppose that improvement added some of its value, sir.

Q. Wouldn't the nearer the property would be located to the city

increase the value of the improvement to the property—such an improvement as this?

A. Yes, I should think it would add something to it, sir.

Q. That is the property at the west end of the improvement just next to the corporation line would be more improved, or made more valuable by an expensive improvement than property half a mile away, or further in the county?

A. Yes, it depends a good deal on the taste of the man that wanted to purchase.

Q. Isn't that the rule in the market?

A. Yes, that is the rule in the market.

Q. And this property of the Shepards would be increased more rapidly in value, at a greater ratio, than the property of Stansberry, located at the other end of the improvement?

64 A. That particular property would not be increased much, because in making the improvement they made a fill, and in order to get the property valuable for lots, they would have to put a great deal of expense on it.

Q. Wasn't that property down about 12 or 14 feet before the improvement was made?

A. I don't think it was, sir. Of course they excavated some east along the ice pond, but I don't think it was quite that.

Q. You say they excavated some for the ice pond?

A. Yes, they took out some dirt there.

Q. So that these complainants, these owners, had excavated this property adjoining the improvement, and made that grade deeper, before the improvement was made, for the purposes of their ice pond?

A. Yes, they did that.

Q. They already had a deep grade down to their property before they made the excavation, didn't they?

A. I don't recollect certainly; that ice pond was built before my time out there, I don't recollect just how it was.

Q. There was some grade down to it before the excavating that they made?

A. Yes, sir.

Q. That not being sufficient they made a further excavation for the purpose of the ice pond?

A. Yes, sir.

Q. Now, going back to that question as to the foot front value, Mr. Denmead, of this property immediately after the improvement, can you not give us the fair market value of that property, with this improvement along it, considering that the improvement was paid for in full in '92, just after the improvement was made?

A. Well, I speak for myself, I would not want to give over $4.00 foot front for it.

Q. You wouldn't want to give over $4.00 a foot front. Don't you know that property just east of that was sold for $75 a front foot immediately after the improvement was made?

A. Of my own knowledge, I do not, sir.

Q. Isn't that common report, and common knowledge there?

A. I believe I heard in this room that that was sold for that; but I don't know; I haven't any knowledge of it at all. I could not tell from hearsay.

Q. So, in your opinion, this property was worth not to exceed $4.00 a front foot after the improvement was made?

A. After the improvement was made.

65 Re-direct examination.

Examined by Judge PUGH:

Q. I will ask you this question, Mr. Denmead, it is leading, probably, but I would like to get your opinion: Isn't it true that all property on both sides of that improved road on the east side—east of the McCalla property, is all for building purposes?

A. Yes, sir.

Q. The improvement did not make any such change in the grade of the street with reference to the lots along each side or necessitate any such depression or elevation of the grade of the lots?

A. No, sir, except the Van Horn property that is opposite.

Q. You said something about the complainants having scraped some dirt out.

A. I said when they made their ice pond they scraped some dirt.

Q. Originally do you mean?

A. Originally, yes, sir.

Q. Did you ever hear of any more than two lots fronting on Broad street being sold by the front foot after the improvement was made?

A. I believe I heard of no property being sold there by the foot front on Broad street at all, until I heard it mentioned in this office.

Re-cross examination.

Examined by Mr. SEYMOUR:

Q. You say that property you considered to be worth about $700 an acre before the improvement was made, Mr. Denmead?

A. Yes, I think it could have been sold for $700 an acre.

Q. What was the fair market value of that property along about '88?

A. Well, about '88, I think it was worth about $700.

Q. Was that prior to the investment of the Bullitt syndicate in property out there?

A. Yes, I think it was.

Q. Didn't the investment by that syndicate raise the values of all property along that improvement about '88 or '89?

A. I never knew but one piece of property that sold for any more than that, and the syndicate bought that.

66 Q. I was endeavoring to fix the value of property in that vicinity; didn't they raise to about double at the time the Bullitt syndicate commenced to make their investments?

A. Yes, sir.

Q. Prior to the time that they came there, what was that property worth, in that vicinity, in the acre?

A. Well, I bought mine for $250 an acre.

Q. $250 an acre.

A. I had 800 feet on Broad street—yes, I had 800 feet on Broad street.

Q. Your land was filled up as high as the roadway in front of it, wasn't it?

A. About two feet higher.

Q. Wouldn't you consider your property of more value than the property of the complainants in this cause, lying down in the hollow?

A. Yes.

Q. What then makes you consider that their property was worth about $500 an acre more than yours?

A. Well, I don't think I said that.

Q. When did you buy your property?

A. I think it was about '86, sir.

Q. When did your property raise in value from $250 an acre, if it ever did raise?

A. Well, sir, it raised in my estimation, and the only absolute raise I could give, one man came and offered a thousand dollars.

Q. When was that?

A. About '88 or '89.

Q. That was the Bullitt syndicate, wasn't it?

A. That was the Bullitt syndicate.

Q. And their investment there raised the value of all the property in that vicinity?

A. I think so, yes, sir.

Q. Was there any other disposals of property in that vicinity that you know of between the time you purchased your property and the time you sold to the Bullitt syndicate?

A. Yes, the property adjoining on the west was sold.

Q. Whose property was that?

A. The Willis property.

Q. Who purchased that?

A. Mr. Callender.

Q. What price per acre?

A. $500.

Q. Do you know when that was?

A. I think I went there in '86—he purchased that after I was there about two years, I think.

Q. That was about '86, then?

67 A. Yes, I think it was.

Q. Well, now, from between the time that you purchased to the time that Mr. Callender purchased, you purchased at $250 an acre, and he purchased at $500 an acre—between these times what was the fair market value of the complainants' property lying down in the hollow?

A. Well, of course, looking at the complainants' property there

from an earning standpoint, it had earning power, it was a land speculation——

Q. The question is the actual value of the land.

A. Well, sir, I would not think that that land was worth over $200 an acre; that was the time that Mr. Callender bought his.

Q. What things operated to raise the value from $200 an acre between '86 and '88 to $700 an acre in 1889?

A. In the first place I did a great deal of improving out there myself—I did a great deal of improving on my own property, and attracted some attention out that way. I put in some drainage along there and there was a general feeling over the city looking towards that particular locality. Mr. Westwater—James Westwater—was about to purchase the McCalla property, but when the time came McCalla raised on him and he refused to take it. That is all the transactions I know of. There was a general increase of land all over the city.

Q. Was there anything done to the property of the complainants that would raise it in value?

A. No, only the surroundings would do it probably. Franklin Park helped this property some.

Q. They had beautified the property some, and they had an old road there in front of it. Wasn't there a general impression that there was to be an extension of East Broad street there, and that street was to be improved and made beautiful, and didn't that tend to elevate the value of that property?

A. We tried very hard to make a nice turnpike there, and that was all; we never intended to — any more. We thought that would add to the value of the property.

Q. Didn't every property owner along there—along that improvement, including the complainants in this case, sign a petition asking the board of county commissioners to make this improvement?

A. Not to my knowledge; I could not say, because I was not there at the time.

Q. Was that talked over before you went away?

A. No, not before I went away.

68 Judge PUGH:

Q. Wasn't there a boom in real estate in this city, especially on Broad street, about two years before this improvement was made, or a year and a half?

A. Yes; to my sorrow.

Q. What time was that; what year?

A. I can locate that from this fact, I know it was about six months or maybe a little longer that Mr. Walter Mahoney sent for me and asked for an option on my property at a thousand dollars an acre, and I declined to do so.

Q. Can you fix the year? Wasn't it in '88?

A. I think it was, sir.

Q. What kind of a boom was that?

A. It was a very lively boom.

Q. Was it a healthy boom or a fictitious boom?

Counsel for defendant objects to the question.

A. I think myself that it was a fictitious boom; it was too high.

Q. You said something about a turnpike, Mr. Denmead; what did you mean by that?

A. When Jerry Bliss lived there, Callender, Bliss and I talked about getting a free turnpike in which would make the road higher.

Q. Did you make the road higher?

A. No, sir; we never got started.

Q. Was there any gravel in the road?

A. I don't think that road was graveled. Still, it does seem to me there was an improvement made there. That is, I believe there was some improvement made of gravel—made by graveling.

Q. Wasn't that a short time before this improvement was made?

A. Yes.

Q. This asphalt was made?

A. Yes.

Q. When did Callender buy the Willis property?

A. I think it was about '88; he didn't hold it very long.

Q. He sold afterwards to the syndicate?

A. Yes, sir.

Q. Didn't the syndicate buy most of the property sold in '89—most of this property?

A. I am not sure about that; I won't say either way.

And also E. G. OREBAUGH, a witness produced on behalf of plaintiff, who, being first duly sworn, testified as follows:

69 Examined by Judge PUGH:

Q. Give your name, residence and occupation?

A. E. G. Orebaugh, 786 Oak street; engaged in the real estate business.

Q. How long have you lived in the city of Columbus?

A. About thirty years.

Q. How long have you been engaged in the real estate business?

A. About 12 or 13 years.

Q. Did you know of the improvement of the continuation of East Broad street by grading and asphalting the roadway?

A. East of Alum creek; yes, sir.

Q. You are acquainted with that improvement are you?

A. Yes, sir.

Q. Assuming that was made in the year '90 or '91, I will ask you if you know what the value of real estate in that vicinity was prior to the making of the improvement, and after the improvement was made?

A. I only know by knowledge of sales that were made at that time.

Q. You had knowledge of the value then?

A. Yes, sir.

Q. Are you acquainted with the property of the complainants in this case, Dr. Shepard, McLeish and Mr. Carr?

A. The property known as the ice property?

Q. Yes, sir.

A. Yes, sir.

Q. Were you acquainted with it at the time—at the two times mentioned?

A. Yes.

Q. What, in your judgment, was a strip off of the front of the property, next to the roadway, 1119 feet long and 250 feet deep, worth in cash just before the improvement of the road was made?

A. I presume the value there, before making the—to make an estimate on that would be by the foot frontage, and that would be very difficult for me to pass an opinion on, because the ground east was much lower than the ground further east on the elevation there, that I don't think that it had a value that the higher ground had.

Q. Taking that into consideration, what, in your judgment, was it—I mean taking into consideration the difference in the grade of the road, as to the property, and the grade as to the other property on the hill, what, in your judgment, was it worth at that time?

70 A. Well, I don't think it would have been worth more than $25 to $30 a foot.

Q. Before the improvement?

A. Yes, sir.

Q. Do you know what change, if any, was made in the grade of the roadway as to the property by the improvement?

A. Well, there wasn't very much change in front of that property, as I remember. It was filled some by the grading of the hill beyond. My recellection is, if I remember right, the old road—the old pike you see was almost as high as the present roadway.

Q. Well, excepting any fill that might have been made after the improvement was made, by Shepard, McLeish and Carr, what, in your judgment, was the value—market value—of that property after the improvement was completed; the same property?

A. The same property?

Q. Yes, this property of the complainants.

A. Do you mean to say immediately after that time?

Q. Immediately after.

A. Well, it had an enhanced, of course, probably $50 or $60 a foot.

Q. How much?

A. I would say $50 or $60 a foot; but that enhanced value I never regarded as being commensurable with the cost of the improvement.

Q. $50 or $60 a foot?

A. $50 or $60; yes, sir.

Counsel for defendant objects to the last question put to witness.

WITNESS (continuing): I don't mean to say it would increase it that much; I mean to say that it was worth probably $50 or $60 since the improvement—following the improvement, at that time.

Q. Assuming that the assessment was $11.25 a foot, that the aggregate was over $12,000, and that over $8,000 has been paid, what do you say as to whether the special benefit to this property has been paid for?

Counsel for defendants object to the question as leading, and asks witness for a conclusion.

A. Well, I think that it had been paid, that it had been paid quite to the extent of the benefits, that portion of it.

No cross-examination.

71 And also Dr. WILLIAM SHEPARD, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name.
A. William Shepard.
Q. Your occupation and residence?
A. Physician; residence, Mifflin township.
Q. How long have you lived in this county?
A. Forty-seven years.
Q. Where did you live during that time?
A. Mifflin township, where I live now.
Q. When did you acquire the property described in your bill?
A. I think it was in 1878—I think 1878 or '9.
Q. Was it purchased by you alone?
A. It was purchased by me alone. I think the deed, however, is made to myself and Mr. McLeish.
Q. Where is this property situated, Doctor?
A. Situated east of Alum creek, and south of East Broad street.
Q. By what other name is that highway designated?
A. By the East Broad Street improvement, or the Columbus and Granville pike—it used to be called.
Q. How much is there of that property?
A. There is a tract of less than forty acres.
Q. You may describe the location of the property, Doctor.
A. It is immediately east of Alum creek——
Q. I mean the surface of it.
A. It was a low piece of ground, the entire property was low—it was bought for ice purposes—for the purpose of securing ice—it was bought for that purpose because it was low.
Q. You know of the road or street having been improved by grading and asphalting?
A. Yes.
Q. How much lower than the roadway, if at all, was this property before the improvement was made?

A. Well, it was 10 feet and 12 feet in some places, and eight and four, it varied—there was some on a level with the street.

Q. What difference, if any, or change, was made in the grade of the street with reference to the property abutting the improvement?

A. The west end of the street and the east end of the street was considerably raised.

Q. About how much?

72 A. Well, probably from 1 to 4 feet, I suppose.

Q. What, in your judgment, was the value of the front of that property on Broad street, 1119 feet long and 250 feet deep, just before the improvement was made?

A. Those properties, in estimating the value I estimate the cost—estimate the value of the property that is on the further end of the 40 acres, and that that is on the improvement—the improved end—the Broad Street end, and strike a balance between them, and the Broad Street property was worth $1500 by the acreage.

Q. This strip——

A. This strip 250 feet wide, I might add we paid—that in paying $250 an acre for the property as we did, we paid $250 for the acreage the farthest away, as well as for that in front, and it divided into a front and back part; the front part was worth $1500 an acre.

Q. How much, in your judgment, was that same piece or strip of land worth in cash immediately after the improvement of the road was finished?

A. I don't think that it could have been sold for any more, or but a little more than $100 an acre after the improvement was made. It was lying too low to be salable.

Q. How much was it worth then?

A. That strip might have been worth $1700 an acre 250 feet wide—$200 added to the original value.

Q. What was the share of each of the complainants in that property?

A. One third each.

Q. How was the property on the east end of this road—this improved road, say the property along a distance of one-half of the improved road, how was it situated with reference to the roadway after the improvement was finished?

A. It was much more largely enhanced in value than the lower end.

Q. How was the grade with reference to the property?

A. The street was depressed, and the land was elevated almost all the way.

Q. I will ask you what you and your co-owners did, if anything, after the improvement was made, or about the time it was finished, in the way of filling up this land for a street?

A. We put a great deal of dirt and money into the ground after the street was made.

Q. How much did that cost you?

73 Question objected to by counsel for the defendant on the ground that the same is immaterial, irrelevant and incompetent.

A. $5,000, and maybe more.

Answer objected to by counsel for defendant, and the motion is made to strike the same from the record on the ground that the same is incompetent and irrelevant.

Q. That is in addition to the assessment you paid?
A. This is in addition to the assessment.
Q. Did you sign the petition for the improvement addressed to the county commissioners?
A. Yes.

Question objected to by defendant's counsel on the ground that it is not part of the complainants' case.

Q. Do you recollect whether you signed your individual name, or signed the names of your associates—your associate owners, also?
A. I signed the Alum Creek Ice Company and my own name, I think.
Q. Did you know before the grade was actually constructed on the ground that the grade of the roadway above your property was to be increased by the improvement?
A. No, I didn't.
Q. Do you know when the improvement was finished, Doctor?
A. I have no absolute recollection.

Cross-examination.

Examined by Mr. DYER:

Q. Doctor, did you mean to say in your examination in chief that you considered the property abutting on the Granville pike at the time you purchased this property, as being worth $1500 per acre?
A. I considered—the property advanced to value; we paid 250 for the entire tract of 40 acres; we took a great deal of land away from the Broad street; when separated into strips 250 feet in width—in 1888, being near the city, I considered it worth $1500 an acre for building lots, and for lots that are on Broad street I considered it more desirable than any other similarly situated.
Q. When did you buy this property?
A. I think it was in 1878.
Q. At the time you purchased this property in 1878 or '9, what value did you place on the strip 250 feet deep and abutting on the Granville pike?
A. I never had any occasion to estimate it. Never divided it into strips.
Q. In determining the value of the tract which you purchased, you consider the entire tract?

74 A. I considered the entire tract in the purchase.

Q. And the market value of the entire tract in your judgment at that time was $250 per acre, was it?

A. Yes, sir.

Q. Did you use that for ice purposes only?

A. Bought it for the purpose of making a pond, artificial lake and freezing ice.

Q. You used the embankment of the Granville road for an embankment for your ice pond?

A. Yes, there was an embankment of ten feet or such matter, and we used a small part of it for the embankment of the lake.

Q. Did you level your embankment?

A. We never leveled the embankment there.

Q. What change, if any, did you make to the bridge of East Broad street from Alum creek?

A. We never made anything; I don't think we even excavated anything; we never excavated up to the road—that embankment, the south end, south of the 40 acres, made an embankment. Too shallow for any use, the water came up to the Granville road, but barely touched the road, but came in here and there; we never got any headway there.

Q. I will ask you to state if you didn't excavate of a portion of the lot at least?

A. We excavated dirt—it was unsightly—it tended to make the land unsightly and we didn't want to make it more unsightly, and we didn't excavate any more.

Q. How near to Broad street did you excavate?

A. I suppose to within 100 feet of Broad street.

Q. How much did you excavate the first year?

A. Very little, because we—we scraped it off and leveled it, not enough to ever make any ice there. We never cut any ice next to Broad street.

Q. You did excavate it some; give us an estimate of the amount within 250 feet of Broad street?

A. At 200 feet we may have excavated a foot; 250 feet we may have excavated a foot and a half; at Broad street we did not excavate at all.

Q. Well, have you ever excavated any part of that land since that time?

A. No, no, we filled it up since that time. Filled that up and more too.

Q. Doctor, before any filling was done there, what did you estimate that property worth per acre?

A. We put expensive improvement on the property.

Q. Irrespective of the improvements?

75 A. We never proposed selling it, and never put any estimate upon it until the question of this improvement was sprung upon us.

Q. Well, what was your estimate?

A. The estimate, I think, was at least $1500 an acre upon 250 feet.

Q. What was your estimate on the parcel?

A. Well, $100 an acre, perhaps, I don't know—I only say—that was a hasty reply, $100 an acre to go in as farming land; $100 an acre; I don't know——

Q. When did you put this $1500 estimate on 250 feet?

A. As soon as we had occasion to put it on.

Q. When was that?

A. When this improvement was made.

Q. When it was in contemplation? It was after it was contemplated, wasn't it, Doctor?

A. The whole thing had an indefiniteness about it; we never talked it over together what that acreage was worth.

Q. Give your opinion now. When did you come to the conclusion that that was worth $1500 an acre, the frontage?

A. When property began to sell $1000 for the 50 acres.

Q. That was just before or at the time the improvement was made?

A. That was before the improvement was made.

Q. It was in contemplation?

A. I don't know only what they told me; I don't think that street was contemplated; I didn't contemplate this street when property was selling at $1000 an acre. When land was selling at 40 and 50 acre tracts at one thousand dollars an acre.

Q. When you put your value of $1500 on the frontage of that property—of your property, this improvement was in contemplation, was it?

A. The purchase of land was in contemplation, but the Broad Street improvement was not to my knowledge in contemplation.

Q. What caused, in your judgment, the value of that property abutting in the Granville road to increase in value from $100 an acre as farm land to $1500 an acre as frontage on that improvement?

A. You refer to my property?

Q. Yes.

A. I didn't say $100 for farm land abutting on Broad street; I said if 250 feet was taken off the front on Broad street, the balance can be considered as farming lands.

Q. Is your property along upon it used for the same purpose, flooded by water and used for ice purposes to the Granville road, the 15 acres——

76 A. 17 acres of it was flooded.

Q. Wasn't the part of your property next to the Granville road used for farming purposes, and also flooded by water up until this fall, which you have made ice upon?

A. I have got property that I ask——

Q. Wait a moment. I expect an answer to the question, and then you can make an explanation.

Question read.

A. What is used for farming purposes I might ask? We didn't use it for farming purposes.

Q. Tell us what you used it for?

A. We used it for driveways and approaches to our business, for fences, for building houses or driveways, and for fences and for business.

Q. Was it any more valuable for that purpose than for flooding and farming purposes?

A. Its location made it valuable.

Q. How much more valuable then was the property next abutting on the Granville road, as used, than the balance of your property?

A. $1400 an acre more than some of it.

Q. That was, you say, prior to the construction of this improvement?

A. Prior to the construction of this improvement.

Q. For how long prior?

A. Well, now, you come again to indefiniteness. We never discussed among ourselves the value of the property; it never sold.

Q. At the time you purchased this property did you consider that that strip of 250 feet south of the Granville road—south side—was worth $1500 an acre?

A. At that time I would have considered it worth $1000 an acre.

Q. And how far distant from the Granville road?

A. 250 feet.

Q. When?

A. I put $1000 an acre of 250 feet and back of that would be adjoining the pond 150 an acre.

Q. Do you know, or have you any knowledge of any property within 250 feet of the Granville road selling for a thousand dollars an acre, from 1878 to 1881?

A. There never was any put on the market for 250 feet in depth; never was sold; never put on the market.

Q. Do you know of any property that was along there that sold at $1000 an acre 250 feet from the Granville road during these years?

A. I never knew—there wasn't any offered for sale, or offer
77 to buy a tract of 250 feet in width. There was 20 and 40 acre strips of land sold at $1500 an acre going back one-third of a mile.

Q. You bought this as low as it was for 250 an acre in 1878?

A. Yes.

Q. To be used for a special purpose?

A. Yes.

Q. That is, to make ice?

A. Yes.

Q. Would you have paid $250 for that property for farming purposes, or for any other purpose than for the making of artificial ice?

A. Wouldn't have bought it at all.

Q. It wasn't worth it?

A. Yes, it was worth it; if it wasn't worth it we could have bought it for less.

Q. The land which you own now wasn't worth $250 in 1878 per acre, was it, only for ice purposes?

A. It was worth that; the man who owned it had no idea that it was valuable for ice purposes; he didn't know it was valuable for ice purposes or that it was bought for special purpose when he sold for 250 dollars an acre; we wanted it for a special purpose, and had to give his price for it, from his standpoint.

Q. In 1890—1889 and '90, what did you consider your property per acre worth, the entire period of time spoken of? The entire footage spoken of?

A. The entire footage was worth in 1889–'90—I consider it worth—well, I consider the whole tract worth as a—do you mean the whole—do you mean as 40 acres?

Q. Yes.

A. I consider it worth $500 an acre; in a strip that wide, 250 feet strip, I should put more value on it.

Q. And why?

A. The nearness to Broad street; if the whole property advanced in value, the front would advance the same.

Q. You say you think the first 250 feet would be worth $1500 an acre at the time that improvement was promulgated?

A. Yes.

Q. What gives the increase in value of that strip?

A. The advance in value of the property.

Q. By reason of the improvement, was it?

A. In one sense the improvement injured it, by raising the grade of the road—it injured it.

Q. But a moment ago you said the value went up to $1500?

A. I say it advanced $200 by the general advance in property.

78 Q. Wasn't that produced by the improvement—the general advance in the property?

A. It may have been by the general advance and the improvement—real estate—there was a damage to the property by the improvement; there was a little advance to the property by the improvement.

Q. You say that the improvement out there increased probably the value of the property down in that vicinity $500 an acre?

A. No, I didn't say that.

Q. Say a thousand or fifteen hundred?

A. I say—I didn't reply to any such question as that.

Q. Isn't that the fact?

A. Before the improvement was made there was no improvement there, and it sold for $1000 and $1200 a half mile east of there.

Q. After the improvement you asked $1500 for this? You considered this worth $1000? You considered yours worth $1000?

A. I considered ours worth, the 250 strip, $1500; when I began to divide the strip this value——

Q. In connection with the improvement?

A. Before the improvement when they were selling the land——

Q. You know they contemplated the improvement?

A. Didn't know that there would be asphalt pavement out there; they attempted it from time to time. If they wanted to make a success of that property there and sell it, they expected to improve, and I suppose in that advance that was going on we had some definiteness among ourselves.

Q. And Broad street was the street to be improved, expected to be improved?

A. The improvement on Broad street—about three years before this property was sold, they made an effort to improve it out east of Broad street—William Wall was one of the commissioners, and they made an improvement there and they criticised them, out between the creek and the Cassidy road; that advanced the value of the property some. That was before the syndicate thought of buying.

Q. Now, Doctor, didn't you contemplate the improvement of Broad street as a part of your valuation of $1500 per acre?

A. I think, as I stated, I didn't know that Broad street was to be further improved.

Q. You don't say now that you did not contemplate the improvement of Broad street in that valuation, will you?

79 A. If Broad street was taken away to-day—the asphalt taken away, and it is not a good street——

Q. Answer the question. I would like to have you answer the question for me.

Question read.

A. Not in its present form.

Q. You assume the improvement of Broad street in the valuation of $1500 per acre?

A. I can not say that I do; it wasn't necessary to consider the value of the improvement of Broad street. The property was all improved; had been sold for ten or twelve hundred dollars an acre.

Q. Will you say that you did not contemplate the improvement of Broad street as a part of the valuation of $1500 on your land?

A. Yes, I will say I didn't consider it; it was a thing we didn't need to consider. I had no idea that I considered the improvement of Broad street.

Q. How does it come, Doctor, that in 1889 and '90, you, together with the syndicate and others that owned property out there, became interested in the improvement of Broad street?

A. The proposition was suggested to the syndicate or agent.

Q. Who?

A. John Mitchell; I didn't wish to stand in the way of an improvement.

Q. Well, did you at any time appear before the board of county commissioners with reference to the improvement?

A. I think not.

Q. You never did?

A. I think not.

Q. Now, in signing the petition for this improvement, you—did you sign for the Alum Creek Ice Company?

A. Yes, sir.

Q. And for the members of your partnership?

A. Yes.

Q. And for the individuals that owned an interest in this real estate?

Q. You had full authority to act?

A. Yes.

Q. You signed the petition?

A. Yes.

Q. Both for yourself and associates?

A. Yes.

Q. You knew at the time the manner in which the petition prayed the commissioners to improve the street, didn't you?

80 A. Yes.

Q. Several ways were suggested, were they not?

A. I think very likely that different characters were suggested in the petition—different courses were suggested. I think it was.

Q. And you filed the petition praying the county commissioners to procure bids for the different character of improvements, didn't you?

A. I think that was so.

Q. You also in your petition asked the commissioners to improve the road under the law which was recently passed?

A. Yes.

Q. To improve roads outside of cities?

A. Yes, I am aware of the law.

Q. That law was passed by the legislature March 26th, 1900; you were aware of the law at the time?

A. Yes sir.

Q. And your petition asked to have the improvement constructed under that law?

A. Yes; I supposed the law was all right.

Q. Now, you asked also in that petition to have the assessment made by the foot front on the strip 250 feet deep; that was your understanding of the territory that was to be assessed to pay for the improvement?

A. I think the law—I supposed it would be done according to the law, and I think the law read by the front foot, but I never had anything to do with that part of it.

Q. It was your understanding at the time that you filed the petition with the board that the assessment, when made, was to be made by the foot front, and on the strip 250 feet deep?

A. I supposed it would conform to the law; I saw by the law it was to be assessed by the foot frontage; nothing was said in the petition that I knew of.

Q. Did you have knowledge at the time of the provisions of that law?

A. I have knowledge of the requirements of the law—whatever was in the law.

Q. Did you read the law?

A. Yes, sir.

Q. Then you knew at the time you filed your petition with the county commissioners that after the improvement was made the cost of it was to be assessed by the foot front on the territory of 250 feet deep on Broad street. Is that right?

A. I suppose it would naturally follow that if I read the law I would know what the law said.

81 Q. Outside of your reading, Doctor, did you know, as a matter of fact, at the time this improvement was made, that that was the taxed territory?

A. Not outside of the reading of the law, I didn't; from the reading of the law I knew it was to be taxed so and so.

Q. From the reading of the law it was to be taxed 250 feet on either side?

A. From the reading of the law.

Q. That is your understanding?

A. Yes, sir.

Q. Doctor, after the filing of the petition your company and the individuals composing it were notified duly, were they, of the filing of the petition, and of the hearing before the board of county commissioners, concerning the granting of the request contained in the petition?

A. If I depend upon my memory, there are many things I don't remember.

Q. You knew that there was such a hearing?

A. Presumably I did.

Q. And that the improvement was granted?

A. I can't say if I did, because I depend upon memory; I take it as a matter of fact that these things are in legal form, or when I became a party I knew it; but as far as memory is concerned I don't remember.

Q. You knew at the time when the improvement was granted?

A. Oh, yes.

Q. And you knew what the character of the improvement was to be—that it was to be an asphaltum improvement?

A. Yes, sir.

Q. You knew also that there were to be side drives?

A. That followed afterwards.

Q. You knew at the time of the changes?

A. That wasn't contemplated; that wasn't a part of the plan when the improvement was commenced.

Q. When was it made a part?

A. Well, as the improvement progressed new ideas were sprung upon the parties, and that was one of them.

Q. You knew about it?

A. I knew as the improvement progressed, I knew about the changes that were proposed, and finally entered into.

Q. Isn't it a fact that that was a part of the original plan?

A. I think not; the asphalt you mean, or the side drives?

82 Q. The side drives and sodding between the trees?

A. I think not, I think the original—I don't think that was in it at all; I don't think so.

Q. You are not sure about that?

A. I don't think it was; that was an after consideration.

Q. You knew, did you not, at the time the estimated cost of the improvement?

A. Yes, I knew at the time the estimated cost was $7.25 a front foot, to be exact.

Q. Did you not at the time that the commissioners visited the road and made an estimate of the value of the property on either side; $20 per front foot before the improvement was made, and $40 a front foot after the improvement was made?

A. I don't know about that.

Q. Did you hear of that at the time?

A. I don't remember hearing of it; I certainly never heard of the 40. I don't think I heard of the 20.

Q. At the time this improvement was granted, was there any meeting of the property holders to determine the proper persons to act as a road committee?

A. I don't think there was.

Q. You were appointed one, were you not?

A. Yes, I was appointed.

Q. Did you serve?

A. Yes, sir.

Q. Who had the authority, of any one, as a representative of that committee?

A. We were authorized to name a superintendent, which we did.

Q. Who was that?

A. Mr. Lunn.

Q. J. C. Lunn?

A. Yes, sir.

Q. He was one of your board?

A. He might have been; I couldn't say. He was superintendent. I could not say about that; I have forgotten.

Q. You authorized him to act for you, and in your behalf?

A. He acted as superintendent. It wasn't in my behalf; he was superintendent of the road. We were authorized to name a superintendent; that was all the commissioners had to do.

Q. Were you over the road?

A. I was over the road—I wasn't over the road as an observer; I made no remarks nor criticisms; I only inquired of some

83 that I thought knew how they were getting along.

Q. Did you- board meet at different times?

A. Never met.

Q. Did you join with other property owners in making suggestions?

A. I tried to get that grade down in front of our property, is all.

Q. Didn't you participate in a certain application for changes from the original plan?

A. I don't know that I did. Very likely I did.

Q. Dr. Shepard, I will ask you to state whether or not you remember of a certain application being made to the board of county commissioners by the Columbus Land Association, and presented by Eugene Powell, an agent, for permission to remove the earth in the circle in East Broad street?

A. Yes, I think I did.

Q. You remember that?

A. Yes.

Q. I will ask you if you remember signing this paper on behalf of the Alum Creek Ice Company:

"COLUMBUS, OHIO, *June 29th*, 1891.

To the commissioners of Franklin county, Ohio.

DEAR SIRS: The undersigned hereby agree in order to settle all controversy about the continuation of the improvement on East Broad street to Alum creek to Cassady road, that if said work is pushed through to completion without delay that they will secure and pay the entire expense in removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle.

This proposition is made, however, only upon condition that the street around said circle be completed and paved in accordance with the plat, order and contract hereinbefore made.

EUGENE POWELL,
Ag't of Columbus Land Association.

The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objection to said improvement and the assessment of their said real estate therefor, on condition that
84 the foregoing agreement shall be kept by said Columbus Land Association.

(Signed) ALUM CREEK ICE CO.
F. C. SESSIONS.
REV. JAMES KEYS, *Ag't.*
MARY P. MARKESON,
Per C. E. MARKESON.
A. E. McCALLA.
WILLIAM F. MILLER.
LAKIN LOWE.
J. C. LUNN."

What have you to say now, Dr. Shepard, as to whether or not you signed this waiver?

A. In the Morrison case the paper submitted to me, signed Alum Creek Ice Company, which I recognized as my signature. If that is the paper I recognize that signature as my signature. That was the same——

Q. You recollect now of the application being made by the Columbus Land Association, and of the waiver made——

A. To have the dirt removed?

Q. Yes.

A. I think I do.

Q. Do you remember then of the waiver made on your part, on the part of the Alum Creek Ice Company?

A. As I said in previous testimony, I can not remember all these things; I can only accept what—I supposed a record would be kept, and it wasn't necessary to remember them, and consequently I don't remember that. But wherever my signature—I recognize my signature, but as a matter of memory——

Q. Do you remember independent of the record now of doing anything?

A. I remember of doing things; but the particular thing I don't.

Q. Do you remember doing anything pursuant to the application of the Columbus Land Association?

A. I remember about that certainly.

Q. But you are not willing now to say that that, the paper I have just read to you, wasn't signed by you?

A. I am not ready to say whether it was or not. I can say that papers presented to me recognize my signature any time that I sign.

Q. Dr. Shepard, do you remember of a question being raised with reference to the cancellation of the contract with Mr. Abbott for the sodding of the sides of this roadway?

A. There was something about the sodding, I think, but that goes back into memory again.

Q. I will read you this to refresh your recollection:

85

COLUMBUS, OHIO, *Sept. 2nd*, 1891.

To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned owners of lands abutting upon the improvement now about finished on East Broad street, respectfully represent that N. B. Abbott, Esq., contractor for said improvement has stated that he was willing to cancel his contract with you for sodding the sides of said improved roadways if it was satisfactory to you, inasmuch as a number of said property owners had informed him that they would rather have grass seed sown thereon. We, therefore, petition that you cancel the above mentioned contract, and we, each one for their respective frontage upon said street, will see

to it, that grass seed is sown upon said side ways of said Broad street this fall, and take upon themselves the care and charge of the same.

MARY P. MARKESON,
By C. E. MARKESON, *Ag't.*
J. C. LUNN.
F. C. SESSIONS.
WM. F. MILLER.
ALUM CREEK ICE CO.
LOGAN M. BULLITT,
Per EUGENE POWELL, *Ag't.*
A. E. McCALLA.
W. SHEPARD.
CHAS. McLEISH."

A. Yes, I think I signed that. I knew there was such a thing, but I wouldn't have remembered it if not called to my attention.

Q. You know that you signed that paper?

A. I think I signed that paper.

Q. Now, Dr. Shepard, I will ask you to state whether you have any recollection with reference to petitioning the commissioners to construct a fifteen inch sewer pipe to be laid along the east line of the premises of Albert E. McCalla, on the south side of said street?

A. Yes, when it is called to my mind, I remember now.

Q. I will read the paper marked "Exhibit D:"

"To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned property owners on East Broad Street improvement, respectfully request that you cause an 15 inch sewer pipe to be laid from the east line of the premises of
86 Albert McAlla, on the south side of said street to such a point east on said street as you may deem necessary. And that you cause a 24 inch sewer pipe to be laid on the north side of said street on the frontage of our respective property abutting upon said street. And that you further cause a suitable gutter to be made on the side next to the curb in the two outer driveways on said Broad street, and that the expense of said work be assessed against our respective property on street, the same as other expenses for making said improvement are levied and paid.

F. C. SESSIONS,
Per E. POWELL.
COLUMBUS LAND ASSOCIATION,
Per EUGENE POWELL, *Agent.*
MARY P. MARKESON,
By C. E. MARKESON, *Agent.*
JOHN R. STANBERRY,
Ag't for Stanberry Heirs.
J. C. LUNN.
ALUM CREEK ICE CO.,
By C. McLEISH.
LARKIN LOWE,
Per JAMES KEYES, *Ag't.*"

A. Now, to that extent, I suppose—I would suppose that I signed it. I do remember of something of the kind, but I can not state that I did or didn't. I don't know whether I signed it or not; I don't know anything about it. I couldn't say that I signed it or didn't sign it, from memory.

Q. You have recollection, Dr. Shepard, of such an application being made?

A. I have recollection that that property needed drainage; I have some memory of that one question—when called to my mind.

Q. And that such an application was made to the commissioners?

A. I think it was made to the commissioners. Mr. McLeish signed it, and if this is his signature he signed it.

Q. Dr. Shepard, you had knowledge at least at the time the sewers were placed in this improvement, of the fact that they were being placed?

A. Yes, I remember.

Q. Of the same?

A. Yes.

Q. Dr. Shepard, do you have any recollection of making an application, with others, to the commissioners for the exten-
87 sion of the time for the payment of the bonds from ten to twenty years?

A. Yes, I remember that; whether I signed any paper or not, I don't know, but I remember it was discussed.

Q. I will read the following paper, "Exhibit B," to refresh your recollection:

"To the commissioners of Franklin county, Ohio.

GENTLEMEN: We, the undersigned owners of lands abutting upon the improvement of Broad street east of Alum creek and to the Cassady road, respectfully petition: that you cause all bonds issued by you for the payment of the expenses of said improvement to be for a period of twenty years from date thereof. And if you can extend the time to twenty years, for the bonds already sold, the extension of time, at which they would mature would be satisfactory to the undersigned; for all of which, we respectfully petition you.

EUGENE POWELL,
Agent, Columbus Land Association.
W. SHEPARD.
L. CARR.
CHARLES McLEISH.
LARKIN LOWE,
Per JAS. KEYES, *Ag't.*
F. C. SESSIONS.
A. E. McCALLA.
WM. F. MILLER.
J. C. LUNN.
C. E. MARKESON,
Agent for Mary P. Markeson."

Did you sign this paper?

A. I did. We made an effort to get that extended.

Q. Do you now recollect the signing of that paper for that purpose?

A. I remember an effort was made to lengthen the time for 20 years.

Q. Did you appear before the board for that purpose?

A. I don't think that anyone appeared before the board.

Q. But you don't know?

A. Well, I don't know they did. The application was made but it was not extended. We tried to have it extended; we found the taxes were very heavy.

Q. Dr. Shepard, I will ask you whether or not as a member of the board of road commissioners, you did not also petition the commissioners to that same purpose?

88 A. I never as a road commissioner—I don't remember of ever doing anything whatever, except to appoint a superintendent.

Q. To refresh your recollection on that point, Dr. Shepard, I will read the following, marked "Exhibit C," which is attached to "Exhibit B," and will ask you if you signed this paper as a member of—as one of the board of road commissioners, endorsing the request contained in "Exhibit B"?

"Whereas, the property owners on the East Broad St. improvement, have petitioned the hon. board of county commissioners to take steps to have the bonds for said improvement extended so as to run twenty yeors.

Now, therefore, resolved that the board for the improvement of said street hereby respectfully request the county commissioners to do all in their power to carry out the prayer of said petition.

W. SHEPARD,
CHAS. McLEISH,
JNO. G. MITCHELL,
Commissioners."

A. I did. My recollection has been refreshed by the paper marked "Exhibit C," and I signed as commissioner hoping thereby to sanction the proposition to extend the limit.

Q. Now, Dr. Shepard, do you remember signing the waiver on account of the loss of certain papers connected with the improvement? For the purpose of refreshing your recollection I present the following paper to you for your inspection, and ask you to state whether or not you recognize the signatures of William Shepard and Charles McLeish attached thereto:

"'EXHIBIT A.'

Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was by us presented to the board of county commissioners of Franklin county, Ohio, praying for the improvement

of the extension of East Broad street, in this county, beginning at the bridge across Alum creek on said street and extending eastwardly therefrom to the Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled, 'An act
89 to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads or streets in certain cases. Passed March 26th, 1890." Which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off the water, and between what points said street was to be improved and the kind of material of a permanent character said petitioners desired used in said improvement, and whereas said petition was signed by all the persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement.

And, whereas, such proceedings were had by said board of county commissioners on said petition and in accordance with said act of the General Assembly that the prayer of said petition was granted and said improvement made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers relating to said improvement have been lost or mislaid,

Now, in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers,

We hereby agree that such petition hereinbefore recited was filed signed by us as herein stated and that we will not set up as a defense against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof any informality arising from the absence or loss of any of said papers but agree that said improvement was legally made and constructed.

LARKIN LOWE,
By JAMES KEYES, *Ag't.*
EUGENE POWELL,
Agent Columbus Land Association.
F. C. SESSIONS

(I believe the above to be true, but "to" not remember all particulars).

C. K. MARKESON, *Ag't.*
W. SHEPARD,
For Alum Creek Ice Co.
JOHN R. STANBERRY,
Agent for the Estate of Henry Stanberry, Dec'd.
J. C. LUNN."

A. I recognize my own signature, but do not feel competent to certify to Mr. McLeish's.

90 Q. Did you sign this paper for the Alum Creek Ice Company as appears by your signature here?

A. Yes, sir.

At this point the further taking of testimony was adjourned.

TUESDAY, *June 5th*—Two o'clock p. m.

Met pursuant to adjournment.

Present: Judge D. F. Pugh, for plaintiff. Mr. Seymour, for defendant.

And also FRANK TALLMADGE, a witness produced on behalf of plaintiff, who being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name and residence, Mr. Tallmadge?

A. Frank Tallmadge, 1517 East Long street, Columbus.

Q. How long have you lived in Columbus?

A. Two years.

Q. Where did you live before the two years?

A. In Marion township, on East Broad street, just east of Alum creek.

Q. How far from Alum creek?

A. Half a mile.

Q. How near to the part of Broad street, or the Columbus and Granville road, that was improved by grading and asphalting?

A. Why, I lived right on that part—right on that road.

Q. On that improvement?

A. Yes, sir; that part of it.

Q. How long did you live there at that place?

A. Ten years.

Q. Whose property was that on which you lived?

A. When I moved there it belonged to Messrs. Callender and Wall and Heffner.

Q. It is known as the Willis property?

A. While I was there it was sold to what is known as the Bullitt syndicate.

Q. It had been the Willis property, though?

A. Yes, sir.

91 Q. Are you acquainted with the tract of land on that road which, at the beginning of this suit, belonged to Dr. Shepard, Mr. McLeish and Mr. Carr?

A. Every foot of it.

Q. What is your occupation—what has been your occupation, Mr. Tallmadge?

A. When I moved to the place described by me in former answers I was in the grain business. I shortly after moving there gave that

up, and became a farmer. A few years after I became a casualty adjuster of Columbus.

Q. When did you leave the Willis, Callender and Wall property?

A. The first of March, 1898.

Q. Prior to your leaving there did you know of property being sold in that neighborhood?

A. Yes.

Q. From 1889 up to the time you left?

A. All property that changed hands in that immediate neighborhood came within my knowledge.

Q. Did you know of property in that neighborhood and along this same road that was improved, being sold before the improvement was made—before the road was made—in '89 I mean?

A. Yes, the Denmead tract and the Willis tract upon which I resided sold that year.

Q. And wasn't it also true of the old woman's property down at the other end, I can recall her name—Draut—the Draut property?

A. I have forgotten that piece of property.

Q. Well, do you know of any property out there being sold after the road was improved?

A. Yes, the corner of—the first street east of the improvement to Broad street, was sold to Mr. Tracy.

Q. One was sold to Tracy, and wasn't there another sold to some one else?

A. Not on the Broad street; he bought the full Broad Street frontage.

Q. Before the improvement, what was the grade of the road in front of Dr. Shepard, McLeish and Carr's property, with reference to the grade of your property? Before the improvement.

A. Previous to the improvement there was a high and dry pike that was ditched on both sides, and this pike was cut down some; the grade was lower.

Q. Do you mean by the improvement?

A. Yes.

Q. Was that true as to all of it, or only part of it, in front of their property?

92 A. The sewer traps were placed right in front of the property you speak of, making a grade down from the bridge and from the hill.

Q. That is about the middle of the property, is it, about the middle of the front of their property?

A. Yes.

A. It is lower there now, the road is, than it was before the improvement?

A. Yes, sir; yes, sir.

Q. How is it as to the two ends opposite their property?

A. Well, from the fact that it is lower in the center, would make the two ends higher.

Q. Now, then, Mr. Tallmadge, before that road was made, what, in your judgment, was the value of that property of Shepard, Mc-

Leish and Carr—I mean the front foot—1119 feet long and 250 feet deep?

A. Worth $500 an acre.

Q. How much, in your judgment, was that same parcel of land a front—1119 feet long and 250 feet deep—worth immediately after the road was finished—after the improved road was finished?

A. Well, that property, like all other property at the time you refer to, depreciated in value.

Q. I am speaking now—I am referring to the time immediately after the improvement was finished there—say in November or December, '91, assuming that the improvement began in September, 1890, and was finished about the first of October, 1891? I want to know what it was worth immediately after the road was finished—after the improvement was finished? I want the cash value.

A. Well, I don't think there was much change in that land—the value—not between those two dates, except that that required the purchase of a large amount of earth in order to fill in for that particular part of the tract to appreciate.

Q. If that was done by Dr. Shepard and his associates, I don't want you to consider that in your estimate of the value of it. Leave that out.

A. There was practically no change in the value of the land until after the last date you mentioned; after that date the land depreciated in value, out there, very materially.

Q. What, in your judgment, was the value of the special benefits derived by the property of Dr. Shepard, McLeish and Carr from that improvement, over and above the general benefits derived from it by the whole community?

93 Question objected to by counsel for defendant.

A. Well, there was none.

Cross-examination.

Examined by Mr. SEYMOUR:

Q. Mr. Tallmadge, do you say that the building of an improved road in front of that property 1119 feet long, costing $11.25 per foot, and that improvement being nearly paid for, would not make the strip abutting on said improvement, 250 feet deep, any more valuable?

A. No, because the land was potato land, and it could not stand the expense of such a street as would ordinarily be placed in front of property worth $300 a foot front.

Q. I say would that add anything to its value?

A. It didn't add anything to this land's value. I don't believe that that asphalt being planted there fertilized that any for potatoes, and that is the only way to improve that land.

Q. Do you consider potato land, as you call it, worth $500 an acre?

A. The strip in front 250 feet deep was worth that much.

Q. Why?

A. Well, at that particular time there was a general awakening towards property out there.

Q. Could you raise more potatoes on land abutting on the improvement than you could back of the improvement?

A. No.

Q. Mr. Tallmadge, as a matter of fact, isn't the proximity of the land to the city of Columbus, its nearness to the principal thoroughfares there, and lots of things, that make that land valuable?

A. I don't consider land east of Alum creek valuable except for gardening purposes; Alum creek stands there as a barrier, and there are no—there have been no improvements out there—substantially, no. And I don't think that that land lying as close as you say it is to the corporation of Columbus, can be considered so valuable after you have seen it as you describe it on paper.

Q. What was that land worth a foot front after the improvement was made?

A. I don't know anything about foot front of farm lands.

Q. Were any sales made just east of this land abutting on the same improvement by the foot front?

A. You mean Mr. Tracy's purchase?

94 Q. I am asking if there were sales made by the foot front?

A. Yes, Mr. Tracy was the purchaser.

Q. What price was paid at that sale?

A. I have understood that Mr. Tracy was allowed the privilege of paying $75 a foot front.

Q. Now, Mr. Tallmadge, your statement is, that if that improvement was made, as it was made in 1890–91, and paid for, that the land abutting on either side of it was not worth one penny more after the improvement than it was before?

A. Mr. Seymour, that is just exactly what I maintain.

Mr. SEYMOUR: Well, that is all I want to know.

Redirect examination.

Examined by Mr. PUGH:

Q. Did you hear of any sale, Mr. Tallmadge, after the improvement was made, of lots or fraction of lots—fractions less than an acre, a little bit south of the improved road?

A. I believe we figured those lots ⅝ of an acre.

Counsel for defendant asks that that be stricken out.

Question read.

A. Yes, sir, they were south of them, south. Yes, there were several of them sold.

Q. Do you know how much they sold for?

A. $1500.

Q. How were they situated with reference to the grade of the streets in front of them?

Question objected to by defendant's counsel.

A. Those lots were higher than the grade of the street.
Q. How much higher?

Question objected to by counsel for defendant.

A. Five or six feet.
Q. How was the Tracy lot situated with reference to the grade of the street after the improvement was made?
A. The Tracy lot was very much higher.
Q. Well, I will ask you this; it is a little bit leading; it is adapted for the purpose of building, the Tracy lot?
A. Yes, a very fine building lot, the Tracy lot.
Q. Would there have to be any change made in the grade of the lot to enable a person to build on it?

Question objected to by counsel for defendant.

A. Oh, no.

95 At this point the further taking of depositions was adjourned to Wednesday, June 6th.

WEDNESDAY MORNING—Ten o'clock.

Dr. SHEPARD resumed the stand.

Redirect examination.

Examined by Judge PUGH:

Q. Doctor, have you inspected the paper entitled Exhibit D shown to you by counsel for the defendant?
A. Yes, sir, I have inspected it.
Q. Did you sign it?
A. I did not sign it.
Q. Was the Columbus and Granville road, on which your property abuts improved, before it was improved under the act of the legislature by grading and asphalting?

Question objected to by counsel for defendant.

A. It was improved before that time by the county commissioners; they made a gravel turnpike.
Q. After the improvement by grading and asphalting was finished, did you use the bank made by the roadway for the purpose of holding the water in your ice pond?
A. The original road furnished an embankment for the premises, and the water in our pond came up to the smallest possible extent for about 100 feet on the old embankment, and between the original embankment and our lake was a strip of higher ground. The water from the lake came around this little curve, leaving it like an

island; between the island and the lake; the water from the lake got up to this island to the embankment in a very shallow manner.

Q. You are speaking of the original road?

A. Yes.

Q. I am talking about the road made by the improvement?

A. It didn't come up to the road made by the improvement. I didn't understand the question; it came up to the old road, but not to the new road at all.

Q. When you signed the paper entitled "Exhibit B," and shown to you by counsel for the defendant, did you understand that you had no authority as a member of the board of improvement to sign such a paper?

A. I didn't suppose I had any authority as commissioner. I signed as an individual simply.

96 Q. You signed it as a member of the board?

A. I signed as a member of the board, but I had no authority to do so.

Q. Besides signing this paper and appointing a superintendent, what else, if anything, did you do as a board?

A. Did nothing; I don't think we ever met as a board, excepting to name a superintendent.

Q. Did the board of improvement, or any member of it, exercise any control over the manner of making the improvement?

A. Not to my knowledge.

Q. Did the board, or any member of it, give any direction to the contractor or the superintendent, as to how the improvement should be made?

A. Not to my knowledge.

Q. Did you individually exercise any control over the contractor, or the manner of constructing the improvement, or give any instructions to him or the superintendent?

A. No, none whatever.

Q. I will ask you whether you knew at the time this improvement was made, or at the time the assessment was made, that the law under which the assessment was made was unconstitutional?

A. I had no idea that it was.

Q. I will ask you when you first learned that the law was unconstitutional; about when?

A. Within the last six months, I should think six months, or a year.

Q. I will ask you whether you were ever notified, or summoned or notified, either verbally or in writing, to attend an inspection, an examination, of the line of this improvement by the county commissioners, or a hearing of the county commissioners of the question, whether the foot frontage of the land abutting on it, with the improvement, would be well worth double the estimated expense of that improvement?

Question objected to by counsel for defendant.

A. I never was notified of any such conference, and never attended any such conference.

Q. I will ask you when you first learned that the county commissioners had made such an examination and inspection and had determined the question as to whether the foot frontage of the land with the improvement, would be worth double the estimated expense of the improvement?

A. I never knew that they made any such examination.

97 Q. Well, you know it now?

A. I know it now.

Q. When did you first learn that?

A. I first learned it when a certain answer was made by the—when answer was made in this case was the first I knew of it.

Re-cross examination.

Examined by Mr. SEYMOUR:

Q. Doctor why didn't the water come up to this new bank made by the improvement?

A. The old bank was 10 or 12 feet high, and the new bank was 3 or 4 feet on top of that. It only came up 6 or 8 inches in the old bank.

Q. The embankment made by the road on which this improvement was made, formed the bank of your pond still, didn't it?

A. The old bank, the old road bank, formed a bank to our pond. The new bank formed no bank whatever to our pond.

Q. That is, the water didn't come up as high as the new one?

A. No, not by 8 or 10 feet.

Q. You were regularly appointed a commissioner of your improved road by the board of county commissioners, were you not?

A. Yes.

Q. For all purposes that such a commissioner should act?

A. As far as I knew I was appointed a commissioner to attend to the duties.

Q. By the board of county commissioners?

A. Yes, sir.

Q. Doctor, why did you ask that this road should be improved in front of your property at that time?

A. The expectation was that it would increase the value of the property there.

Q. That it would benefit your property?

A. Yes.

Q. That is what you expected, and that is the reason you were active in having that improvement made?

A. Yes.

Judge PUGH:

Q. I will ask you now whether, in your judgment, the property had derived any special benefit from the improvement over and above the benefits shared in by you with the whole community.

Question objected to by counsel for defendant.

98 A. Not any more than the community at large received benefits.

Q. Do you know the exact amount of assessments you paid, Doctor?

A. We paid seven assessments. I don't remember the exact figures.

Q. You may refresh your memory, Doctor, from these papers. (Handing witness papers.)

A. Upon refreshing my memory I would say we paid $11,981.22.

At this point the further taking of depositions was adjourned.

Dr. WILLIAM SHEPARD (recalled).

Examined by Judge PUGH:

Q. Doctor, you were asked on cross-examination about being a member of the legislature. When were you a member of the legislature?

A. Elected in 1885 for two years.

Q. And you served one term—once elected and served one term?

A. Yes, two years.

THURSDAY, *June 14th*, 1900.

And also WALTER BRAUN, a witness produced in behalf of plaintiff, who, being first duly sworn, testified as follows:

Examined by Judge PUGH:

Q. Give your name?

A. Walter Braun.

Q. Occupation?

A. Civil engineer.

Q. Do you fill any official position?

A. Deputy county surveyor.

Q. How long have you been such?

A. Been deputy about ten or eleven years.

Q. Were you a deputy under John J. Dun, in 1890, and the following years?

A. Yes, sir.

99 Q. I will ask you whether you had any connection with the East Broad Street suburban improvement as deputy county surveyor?

A. Yes, I was put in charge of the work after the first engineer, Mr. Legg, retired from office.

Q. That is the improvement, is it, for paying the costs of which the property of Shepard, McLeish and Carr was assessed?

A. Yes, sir.

Q. Who made out the assessment sheet?

A. I made out the assessment sheet.

Q. What is the assessment sheet?

A. It is the sheet showing the cost of the improvement per foot front on the abutting property.

Q. I will ask you how you made the assessment for the East Broad Street improvement?

A. The total cost of the street was taken as shown from our record—taken from the contract book, and was taken from the auditor's records as given by the auditor, the total cost was then proportioned on the abutting property by the lineal foot.

Q. Each foot then was assessed the same as every other foot front?

A. Yes, sir.

Q. When were the sewers constructed, Mr. Braun, with reference to the time when the assessment sheet was made?

A. The sewers were constructed after the original assessment was made out; they did not enter into the original contract nor the original assessment.

Q. You mean by that that the cost of the sewer was not included in the assessment of $11.25 a foot front on the property?

A. Yes, sir.

Q. Who has the custody of the assessment sheet?

A. The auditor has custody of the assessment sheet.

Q. And that sheet shows the rate per foot front, does it?

A. Yes, there is a rate assessment sheet which shows the rate per foot front, and later on there was an itemized cost of the street made out.

Q. Who made that out?

A. I made that out.

Q. You say you made that after the assessment sheet was made?

A. Yes, to show the various items.

Q. Do you recollect the exact time when the improvement was finished, Mr. Braun?

A. I couldn't tell just the date when it was finished.

100 Q. Have you with you a book containing the cost of the improvement that was paid to the contractor?

A. Yes, sir.

Q. You may state the amount was paid to the contractor?

A. The amount paid to the contractor was $89,470.09.

Q. Who was the contractor for building the sewers?

A. E. M. Stanley built one of the sewers?

Q. The contractor whose cost amounted to $89,470.09 was N. B. Abbott, wasn't it?

A. Yes, sir.

Q. In what year were the sewers built?

A. I don't recollect the year; the contract would show that. I would have to look that up in the contract.

Q. It wasn't done in the year '91, was it?

A. It wasn't done in '91.

Q. Was it done after the year '91?

A. Yes, it was done after the year '91.

Q. What buildings were on the property of the complainants, Shepard, McLeish and Carr?

A. There were no buildings, no dwellings, but there were several ice houses. They were back 5 or 6 hundred feet.

Q. There were no buildings at all any time on the strip 250 feet deep?

A. No, sir.

"EXHIBIT E."

Agreement.

Agreement by and between Leonard Carr, party of the first part, and William Shepard, Charles McLeish, Thomas C. McLeish and Joseph Busch, party of the second part.

Witnesseth: The said Leonard Carr agrees to sell to the said Thomas J. McLeish and Joseph Busch all of his interest, being the undivided one-third part thereof, in the property owned by the Alum Creek Ice Company in which heretofore the said William Shepard, Charles McLeish and Leonard Carr were equal partners, each owning one-third interest in the property, real and personal, belonging to the said Alum Creek Ice Company.

The said Leonard Carr further agrees to deed to said Thomas J. McLeish and Joseph Busch the one undivided third part of the real property heretofore belonging to said Alum Creek Ice Com-
101 pany, consisting of about thirty-nine acres of land on Broad street and Alum creek immediately south and east of the Alum Creek bridge on Broad street, and adjacent to the city of Columbus, Ohio, and also the undivided one-third part of ten acres of land owned by said company near the Licking reservoir in Fairfield county, Ohio.

The said Leonard Carr also agrees to sell and does hereby sell and convey to said Thomas J. McLeish and Joseph Busch his undivided one-third interest in the personal property heretofore belonging to said Alum Creek Ice Company. Said personal property consisting of a lease made by the State of Ohio; the ice houses, buildings, horses, wagons, ice tools, outstanding claims and bank accounts and being all the personal property owned by said partnership heretofore known as the Alum Creek Ice Company consisting of the parties heretofore named as said partners. The deed for the real estate, and the personal property heretofore described, to be delivered to said Thomas J. McLeish and Joseph Busch, conveying the interest therein of said Leonard Carr, on the performance by said parties of the second part of the conditions to be performed by them as hereinafter set forth.

The said Thomas J. McLeish and Joseph Busch agree to pay said Leonard Carr for said property heretofore described the sum of $10,250.00, as follows: $1,250.00 of said sum to be paid this day. $1,000 in thirty days from the date hereof, $1,000.00 in sixty days from the date hereof, and $1,000.00 in ninety days from the date

hereof. Said three thousand dollars which is to be paid in thirty, sixty and ninety days, as aforesaid, shall be evidenced by three promissory notes executed and delivered to said Leonard Carr, signed by William Shepard, Charles McLeish and Joseph Busch. The balance of said purchase price, to wit: the sum of $3,000.00, to be paid in one, two and three years from the date hereof in equal payments of $1,000.00 each, and to be evidenced by three promissory notes signed by said Thomas J. McLeish and Joseph Busch and secured by mortgage on the real estate this day sold to them and described as the thirty-nine acre tract on Broad street. All said notes for said deferred payments to bear interest at six per cent. per annum, payable annually from date hereof.

In addition to said purchase money paid and to be paid as heretofore set forth, the said William Shepard, Charles McLeish, Thomas J. McLeish and Joseph Busch agree to assume and pay all the outstanding indebtedness of the late partnership known as the
102 Alum Creek Ice Company. Said indebtedness to include all notes, mortgages and all obligations owing by said firm whether the same be evidenced by notes or other obligations signed by said company or firm name or signed by the said William Shepard, Leonard Carr and Charles McLeish in their separate individual names. The intention hereof being to require said parties of the second part to assume all indebtedness contracted by or for said partnership heretofore known as the Alum Creek Ice Company. Said indebtedness to be paid as the same matures. Said parties of the second part further agree that they will take up the outstanding notes, except those secured by mortgage, now held by the creditors of said Alum Creek Ice Company and substitute therefo. other notes signed by the new members of said firm in connection with said William Shepard and Charles McLeish as soon as they may be able to do so.

The said conveyance from said Leonard Carr to Thomas J. McLeish and Joseph Busch shall be made subject to the mortgage on said property, and to all taxes, liens and assessments now due or hereafter to become due.

The note held by Mamie Carr, originally given for $1,500.00, upon which some payments have been made, being for indebtedness by said firm, shall be paid by the members of the new firm; and no part thereof shall be paid by said Leonard Carr.

In witness whereof, the parties hereto have hereunto set their hands this 1st day of July, 1899.

LEONARD CARR.
CHAS. McLEISH.
THOMAS J. McLEISH.
JOSEPH BUSCH.
W. SHEPARD."

It is stipulated and agreed by the parties through their attorneys that the aggregate of the frontage along the improvement in question, including both sides of the road or street, was 9615 and 38-100

feet; that the improvement of Broad street or road was completed on the 1st day of October, 1891; that the paper marked "Exhibit A" was filed with the county commissioners on the 28th day of September, 1891; that the county commissioners ordered the improvement to be made on the road May 3rd, 1890; that on the 18th day of August, 1890, said commissioners established in said
103 Broad street a public circle 250 feet in diameter; that on the same day the said commissioners awarded the contract for constructing the improvement to N. B. Abbott; that the frontage of the Stansberry lot was 555 feet, and that the cost of the sewers *were* $6115.

Exhibits "A," "B," "C," "D" and "E" are offered in evidence and made a part of these depositions.

It is further stipulated and agreed by the parties that the services of the superintendent appointed by the board of improvement amounted to the sum of $186.00, and that the following letter contains a correct statement of the cost of the circle and a portion of the costs that was assessed upon the property owners:

"COLUMBUS, OHIO, *Sept. 4th*, 1891.

Auditor, Franklin county.

DEAR SIR: In answer to your inquiry about the cost of the East Broad Street circle, Deputy W. Reamy has made the following rough estimate:

Cost of circle	$17,862
Cost of straight road	7,272
Extra cost of circle	$10,590
The Bullitt Park Co. would have paid on about 800 ft. on a straight road, but on circle will pay on about 1056 feet frontage, or 256 feet more at about $10.00 per foot, or...	2,560
Balance extra cost of circle	$8.030

Yours truly, JOHN A. DUNN,
County Surveyor."

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer, Franklin County, Ohio, Defendant.

By agreement of parties, by their counsel, the depositions
104 of the within named witnesses were taken before Mr. George L. Stoughton, a notary public, and at the time and place agreed upon.

Testimony Offered on Behalf of Defendant.

FRIDAY, *June 15th*, 1900—4 o'clock p. m.

Present: Judge D. F. Pugh on behalf of complainants. Mr. J. H. Dyer on behalf of defendant.

Mr. DYER: It is stipulated and agreed that the following is a copy of the record of the county commissioners of Franklin county, Ohio, under date of March 31st, 1890:

"MONDAY, *March 31st*, 1890.

"This day the petition of Logan M. Bullitt and others for the improvement of East Broad street from the east side of Alum creek to the road known as the Cas[illegible] road, was presented to the board of commissioners. Thereupon the board appointed Tuesday, the 29th day of April, 1890, at 10 o'clock a. m., at the office of the county commissioners in the court house of Franklin county, Ohio, as the time and place for the hearing of said application, and also ordered that notice of said hearing be published in the Weekly Post, a newspaper of general circulation in the vicinity of the proposed improvement to be made for not less than two consecutive weeks, once each week, and ordered also that service of like notice be given to all owners of property fronting upon the proposed improvement, their agents and attorneys, at least two weeks before said hearing."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"COLUMBUS, OHIO, *March 5th*, 1890.

To the hon. board of county commissioners:

This is to certify that I have served the above notices of the proposed improvement of East Broad St. on the following property owners:

Alum Creek Ice Co., Albert McAlla, Logan M. Bullitt, per John Mitchell, ag't, Josiah Lun, Fred and Eliza Benninnus, Frederick Miller, Henry Stansberry, per Henry E. Taylor, ag't, Francis C. Sessions, Mary A. O. Markeson and Larkin Lowe.

JOHN J. DUN,
County Surveyor,
Per E. E. LEGG, *Deputy*."

105 It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"TUESDAY, *April 29th*, 1890.

"In the matter of the petition of Logan M. Bullitt and others for the improvement of East Broad street, Marion township, said matter

having been set for hearing this day, and the following claims for damages having been filed, viz., to wit:

William F. Miller, $2500 damages, $250 compensation.
E. Bennigus, 1800 "
Sarah R. Barr, 1000 "

and the board desiring to visit said improvements first, hereby postponed said matter until Friday, May 2nd, 1890, at ten o'clock, as the date of her claims for damages, etc.

Yeas, CASSADY AND MOREHEAD."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"SATURDAY, *May 3rd*, 1890.

"In the matter of East Broad Street improvement, the commissioners of Franklin county, Ohio, since the filing of the petition for the improvement of East Broad street from the east end of the bridge across Alum creek to the Cassady road, have made a personal inspection and examination of the land of the proposed improvement, upon each side of the said proposed improvement, and are satisfied after such examination and inspection that the said improvement will be for the public welfare and convenience.

The commissioners further find that to construct the said improvement it will be necessary to assess the lands upon each side of the said proposed improvement about the sum of $7.25 per foot front, and they further find that the present valuation per foot front of lands fronting and abutting upon said proposed improvement is upon an average of $20.00, and that after the said proposed improvement has been made as prayed for in said petition the average valuation of lands abutting thereon per foot front will be worth at least the sum of $40.00, which will be more than double the estimated expense of the said proposed improvement.

106 The further consideration of the claims for damages and compensation was again postponed until Monday, May 5th, 1890, at 10 o'clock a. m.

MOOREHEAD & CASSADY,
County Commissioners."

It is also stipulated and agreed that the following is a copy of the commissioners' record of Franklin county, Ohio:

"MONDAY, *May 19th*, 1890.

In the matter of the extension and improvement of East Broad street, the hearing of the petition for the extension and improvement of East Broad street having been adjourned from the 29th day of April, A. D. 1890, until this 19th day of May, A. D. 1890, at 2 o'clock p. m., and now all parties being present in person, or by agent or attorney, the petition in this case came on to be further heard, and

after examining the papers filed in this case, and hearing the testimony, the commissioners find that the petition for the extension and improvement of East Broad street has been duly signed by the property owners representing a large majority of the feet frontage of the lands abutting upon said street between the said limits mentioned in the said petition as the starting point for said improvement, at the east end of the bridge across Alum creek, and extending eastward therefrom to the Cassady road. The said points being the points named in the said petition where the said improvement shall begin and end, and the distance between said points mentioned being about 5000 feet. And the commissioners find that the owners of a clear majority of the feet front of lands abutting the said proposed improved roadway favor said improvement, and that the proposed improvements are judicious, and hereby declare said improvement authorized and established and do declare the width of said road legalized and established as to the dimensions and manner as prayed for in said petition, to-wit:

To be of the width of 100 feet throughout the entire distance between said points above named as the starting and ending points of said improvements, and the county surveyor of said county of Franklin is hereby required and ordered, upon receiving notice of the action taken by the commissioners herein, that said road has been widened and other improvements authorized as prayed for in said petition, to proceed at once to survey said road,
107 erect stakes or monuments in front of each piece of property making the outside lines of such road so widened as above ordered, and doing whatever other work necessary for the carrying out and extension of said work as ordered. And now the claim filed herein by William Fred Miller, coming on for hearing was heard upon the testimony presented for and against said claim for damages and by the consent of all parties in this case, and with the consent of W. Fred Miller, the commissioners do find and determine the amount fairly due the said W. Fred Miller as damages for land, building and fences appropriated for the widening of the said street to be the sum of $1250.00.

And thereupon next came on for hearing the claim for damages filed herein by E. Bennigus, and said claim was heard upon evidence offered in favor of and against said claim, and by consent of said claimant and the other parties interested in the said improvement and property holders, the commissioners do find and determine the amount fairly due for the said claimant for land and improvements appropriated for the widening of said street to be $600.00.

There being no other claim for damages presented or filed by any owner of property along or adjacent to said proposed improvement, it is ordered by the commissioners herewith that the work for furnishing materials and constructing the said proposed improvement in accordance with the prayers of the petition herein be let to the lowest and best bidder after two weeks' notice of said letting shall be published in the Columbus Evening Post, a newspaper of general circulation in the vicinity of said proposed improvement. Said

letting of said work and furnishing of materials, and constructing said improvement to be opened at the office of the county auditor on Wednesday, January 4th, A. D. 1890, at 12 o'clock noon, and it is ordered that all bids received shall be in accordance with the rules established for letting of said contract, which are printed and posted in the office of the said commissioners.

The board this day appoint J. C. Lunn, J. C. Mitchell, Albert McCalla, William Shepard and John J. Dun (surveyor) as commissioners of East Broad Street improvement (in Marion township.)

Resolved by the county commissioners of Franklin county, Ohio, That the bonds to be issued for the extension of East Broad street, from the east end of the bridge across Alum creek in Marion township, of Franklin county, Ohio, and for the improvement of said street, from said east end of said bridge to the Cassady road
108 under the authority of law passed by the General Assembly of the State of Ohio, March 26th, A. D. 1890, entitled, "A bill to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities or intersecting streets in certain cases; shall be of the denomination of $1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semi-annually, interest and principal payable at the office of the treasurer of Franklin county, in the city of Columbus, Ohio, and one-tenth part of the principal of said bonds shall be payable on or before the first day of July in each and every year until said bonds shall all be paid, said payment of said principal of said bonds to commence July 1st, 1891. Said bonds shall be dated July 1st, 1890.

Resolved by the county commissioners of Franklin county, Ohio, That the county auditor be, and he is hereby, ordered to prepare and advertise for sale the sum of $40,000 of the bonds of said county, to be designated East Broad Street improvement bonds. Bids for said bonds to be received until noon Monday, June 2nd, A. D. 1890.

MOOREHEAD & CASSADY."

It is also stipulated and agreed that the following is a copy of the county commissioners' record of Franklin county, Ohio:

"COLUMBUS, OHIO, *June 29th*, 1891.

"To the commissioners of Franklin county, Ohio.

DEAR SIRS: The undersigned hereby agree in order to settle all controversy about the continuation of the improvement on East Broad street to Alum creek to Cassady road that if said work is pushed through to completion without delay, that they will secure and pay the entire expense in removing all the earth upon the circle in East Broad street, and beautifying and adorning said circle. This proposition is made, however, only upon condition that the

street around said circle be completed and paved in accordance with the plat, order and contract hereinbefore made.

EUGENE POWELL,
Ag't of Columbus Land Association."

"The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under the
109 proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objections to said improvement, and the assessment of their said real estate therefor, on condition that the foregoing agreement shall be kept by said Columbus Land Association.

(Signed) ALUM CREEK ICE CO.
F. C. SESSIONS.
REV. JAMES KEYS, *Ag't.*
MARY P. MARKESON,
Per C. E. MARKESON.
A. E. McCALLA.
WILLIAM F. MILLER.
LAKIN LOWE.
J. C. LUNN."

Counsel for complainants object to the introduction in evidence of the foregoing because the original is not proved to have been lost or destroyed, and because the original is the best evidence.

It is also stipulated and agreed that the following is a copy of the records of the county commissioners of Franklin county, Ohio:

"MONDAY, *August 18th*, 1890.

Resolved by the commissioners Franklin county, Ohio, That there be and hereby is established in Broad street a public circle 250 feet in diameter, which land is donated by the Columbus Land Association. Said circle to be, however, dedicated to the public use and located as shown by the proof on file at the office of the county surveyor of said county."

It is further stipulated and agreed that on the 1st day of July, 1899, a warranty deed was executed by Leonard Carr, one of the complainants herein, as grantor, to James McLeish and Joseph Busch, conveying the premises described in the complaint herein, in which deed the following stipulation appears:

"Except a mortgage for $6,000.00 given by William Shepard, Charles McLeish and wife, and Leonard Carr and wife to F. F. Hoffman as recorded in Mortgage Record 156, page 560, Franklin county, Ohio, records, and excepting all taxes and assessments, of whatever kind and nature, that may be a lien on the one-third part of the Marion Township property hereby conveyed, and all taxes, liens and assessments that may be due and unpaid on the other property hereby conveyed being hereby assumed by the grantees herein as part of the purchase price for said premises."

It is further stipulated and agreed that the following is a copy of the county commissioners' record of Franklin county, Ohio:

110 "To the honorable board of county commissioners of Franklin county, Ohio:

Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto, was by us presented to the board of county commissioners of Franklin county, Ohio, praying for the extension of East Broad street in this county, beginning at the bridge across Alum creek on said street, and advancing eastwardly therefrom to Cassady road, which said portion of said street lies in Marion township, said county, which said improvement was in said petition prayed to be made under the provisions of an act of the General Assembly of Ohio, entitled "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class to improve roads extending from such cities and other roads or streets in certain cases," passed March 26th, 1890, which said petition stated with what material said street should be paved and what provisions should be made for sidewalks, gutters and other passages for carrying off water, and between what points said street was to be improved, and the kind of material of a permanent character said commissioners desired used in said improvement, and

Whereas, said petition was signed by all persons owning property abutting upon the portion of said street in said petition asked to be improved, said petition stating the number of feet between the termini of said improvement, and

Whereas, such proceedings were had by said board of county commissioners on said petition, and in accordance with said act of the General Assembly, that the prayer of said petitioners was granted and said improvement was ordered to be made in accordance with the prayer of said petition, and

Whereas, said original petition as well as other papers filed since said original papers, and certain orders made by said board of county commissioners, relating to said improvement, have been lost or mislaid, and

Whereas, since the making of said original order by said board of county commissioners directing said improvement to be made some important changes in the plan, extent and character of said improvement have been ordered by said board of county commissioners, and have been made or are now being — at the written request of each and all of —, including the construction of a circular park in said street and sewers for proper drainage and other things not herein particularly mentioned, and

111 Whereas, by reason of said changes and extensions the cost of said improvement has been increased in a large amount beyond that contemplated, and which would have been sufficient according to said original petition and plan, and

Whereas, some doubts have arisen as to the legality of the proceedings of said board of county commissioners in said matters and

of bonds that have been or may hereafter be issued by said board of county commissioners for the purpose of raising the means to pay the cost and expense of said improvement.

Now, therefore, in consideration of said improvement as the same has been and now is being constructed, and in order that the bonds heretofore issued and to be issued to pay for said improvement may not lie under suspicion or remain unsold by reason of the absence, or loss of said original or other papers and orders, or by reason of the other matters, acts and things hereinbefore stated, we, and each of us, hereby agree that such petition hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against the collection of any assessment upon our said property abutting upon said improvement for the payment of bonds issued, or to be issued on account thereof, any informality or irregularity arising from the absence or loss of any of said papers, or any of the other matters and things hereinbefore recited, but agree that said improvement has been and now is being legally made and constructed, and we hereby request that you execute and issued such further amounts of bonds as shall be necessary to pay the costs of said improvement.

(Signed) LOGAN M. BULLITT,
Per THE COLUMBUS LAND ASSOCIATION,
By T. E. POWELL,
Director. Feet Front, 3775.34 *Ft.*
MARY P. MARKESON,
By C. E. MARKESON,
Ag't in Fact. Foot Front, 375.54.
F. C. SESSIONS. *Feet Front*, 747.41.
WILLIAM SHEPARD. *Feet Front*, } 1111.
CHARLES McLEISH, }
J. C. LUNN. 361.87.
THE HEIRS OF HENRY STANSBERRY, DECEASED,
By JOHN R. STANSBERRY,
Ag't in Fact. 550 *Feet.*

And whereas, the further sum of $60,000 is now required to pay the cost and expenses of said road improvement so far as the same has progressed.

Therefore, resolved that there be at once executed and delivered to the Ohio savings bank $60,000 of the bonds of this county
112 on payment therefor *of* said bank of the amount bid for same on August 1st, 1891, to 60 bonds of $1,000 each, to bear date of July 1st, 1891, to be numbered from No. 51 to 110, both inclusive; to bear interest at 6 per cent. per annum payable semi-annually on the 1st day of January and July in each year, principal and interest to be payable at the office of the treasurer of Franklin county, Ohio."

CASSADY, MOOREHEAD AND McDONALD."

Counsel for complainant object to *the* so much of the foregoing copy from the record of the county commissioners as purports to give a copy of the paper addressed to the county commissioners and signed by Logan M. Bullitt, William Shepard, Charles McLeish *et al.*, because there had been no proof of the destruction or loss of the original paper, and because there is no proof that said Shepard and McLeish signed said paper, either the original paper or a copy of the original, or the paper spread on the records of the county commissioners; and because if the said paper is a copy of another paper of similar import, about which Shepard was cross-examined, and which is marked "Exhibit A" in his deposition on cross-examination, the original is already in evidence.

SATURDAY MORNING, *June 16th*, 1900.

And thereupon CHARLES O. TRACY, a witness produced on behalf of defendant, who being first duly sworn, testified as follows:

Examined by Mr. DYER:

Q. You may state your name?
A. Charles O. Tracy.
Q. Where do you live?
A. 593 E. Broad street.
Q. You may state, Mr. Tracy, whether or not you are the owner of any property on what is known as the East Broad Street improvement?
A. Well, I am not the present owner at this time; my wife is. I bought the property originally.
Q. When did you purchase that property?
A. I should say in August, '91, as near as I could get at it.
Q. State what was the condition of the East Broad Street improvement there at that time?
A. I have nothing to go by, but my recollection is that the
113 asphalt was done. The cross road that runs north of that property—that is the first square this side of that circle, that wasn't done as yet, for that is just a graded street.
Q. Was the Broad Street improvement practically completed out below the bridge?
A. My recollection is that it was.
Q. I will ask you to state what you gave for the property per front foot?

Question objected to by counsel for plaintiff.

A. $75.00 for the Broad Street lot, and $15 a front foot, I believe, for the lot just back and adjoining the Broad Street lot.
Q. I will ask you to state whether or not you considered that a fair market value of the property at the time you yourself purchased?
A. Well, there is a great deal in prospective, taken at that time. I thought like many others, supposed the property being improved

would increase more rapidly. I thought that a fair price at that time.

Q. Did you know of any property, any other property, in the vicinity of yours, that was sold at or about that time?

A. I don't know of any on Broad street; a majority of the sales were lots sold on cross streets, the $15 price.

Q. What frontage have you on Broad street?

A. The lot, I believe, was 100 feet front on Broad street.

Q. And how deep?

A. 250 feet.

Cross-examination.

Examined by Judge PUGH:

Q. Wasn't some of the value of that property fictitious?

A. Well, undoubtedly, when they put that street there it added very materially to the cost of—to the original cost of the property. I didn't buy the property on that basis—as a matter of speculation. I bought it thinking I might want to use it for a suburban home, bought it really for personal use, and that is the reason I bought the lot back of it so that I could have plenty of room.

Q. Do you know where the property belonging to Dr. Shepard, Mr. McLeish and Carr is situated?

A. Dr. Shepard's property is the ice plant, I believe; the ice house. I don't know anything of the Carr property.

114 Q. Do you know anything about the value of that property when the improvement was finished?

A. No, sir; I don't know anything of the value of the property there at all.

Q. Do you think that was worth as much as yours?

A. I would not have paid the same price for it, it was lower and there was too deep a grade made there.

Q. You don't know of any property ever selling there—of any property being sold there, except East Broad street?

A. I don't know of any on Broad street.

Q. What was the grade of your lot above the street?

A. Probably 4 to 5 feet.

Q. And in the condition for residence purposes?

A. Nice terrace property, yes, sir.

Q. To make it adapted for residence purposes it would not be necessary to lower it any?

A. No, sir.

Q. Isn't that also true of most of the property on the east end of this improvement?

A. Further east it didn't, below where—down below I would say the grade had elevated that property above the street.

Q. There is at least half the frontage along the improvement, beginning at the east end, that it is in about the same condition as this was?

A. The average I should say there is in desirable shape.

Q. How near was your lot to the circle?
A. The first street this side of the circle; the northwest corner—first street west of the circle—on the northeast corner.
Q. It don't front on the circle?
A. No.
Q. It fronts on the street this side of it?
A. It fronts on Broad street, facing south.
Q. Some part of the side of that lot is on the circle?
A. No, sir.
Q. None of it?
A. No, sir; I am not on that circle at all.
Q. Not on the circle at all?
A. I am a square west of that; near Josiah Lunn's place.

And also LEONARD CARR, a witness produced on behalf of the defendant, who, being first duly sworn, testified as follows:

115 Examined by Mr. DYER:

Q. Mr. Carr, you recently sold your interest in the Alum Creek Ice Company, and in certain real estate belonging to that company, didn't you?
A. Yes, sir.
Q. At the time you made this sale, I will ask you to state whether or not the assessment for the improvement of East Broad street was considered as a part of the consideration?
A. Yes, sir.
Q. I wish you would explain that to us.
A. Well, when I come to figure up—to make the sale, I asked for the indebtedness, and they gave it to me, and among the rest was this assessment of Broad Street property; I think they told me there was $4500 still back assessment on the property, and they charged me up with $1500, one-third of the assessment, a tax for the improvement on Broad street.
Q. And you permitted them to figure $1500.00 as part of the indebtedness of the ice company for this assessment—your share of this assessment?
A. Yes, sir.
Q. It was settled on that basis, was it?
A. Yes, sir.
Q. In other words, you paid $1500 of this assessment to your grantees?
A. Yes, sir.

Cross-examination.

Examined by Judge PUGH:

Q. The payment of the one-third of the assessment was not all of the consideration for the property?
A. Oh, no; oh, no.

Q. All the consideration is shown by that agreement, is it?
A. No, I don't know as it was, but——
Q. I mean the agreement in writing?
A. I made them an offer of what I would take to pay for all these things and they done that.
Q. Mr. Carr, I want to ask you a question. Did you ever receive any notice in writing, or otherwise, or any invitation in writing or otherwise, to attend a meeting of the board of county commissioners, at which the question as to whether or not the frontage of these lots, or these properties, with the improvement, would be enhanced in value double the amount of the assessment cost?
116 A. No, sir; no notice at all. I may add I objected to the improvement—to an improvement of that kind, but I was in a fix that I could not do anything, because the majority ruled, and the majority was in favor of the improvement. I thought it would cost more than the land was worth, and it is true; I would not take that 250 feet to-day and pay the assessment for it.
Q. You did receive a notice of the application for the improvement of the road?
A. Well, in an indirect way from my own partners, but from no others.
Q. The record shows that there is a notice served on the Alum Creek Ice Company?
A. That all may be, but there was none served on me personally at all.

Re-direct examination.

Examined by Mr. DYER:

Q. Dr. Shepard looked after the business, didn't he, of this improvement?
A. Yes, sir.
Q. He attended a meeting at the commissioners' office didn't he?
A. Yes, sir, I presume he did; I couldn't tell you positively, because I don't know that he did.
Q. He reported to you at different times concerning this improvement?
A. Yes, sir, that is all the information I got, I got from him.
Q. From Dr. Shepard?
A. Yes, sir.
Q. He was a partner?
A. Yes, sir.
Q. He had charge of this part of the business?
A. Yes, sir.
Q. Then Dr. Shepard had, as a partner, full authority had he, from the partnership?
A. Yes, sir, of course.
Q. Mr. Carr, did you not, at the time this improvement was made, know what the assessment cost was?

A. Well, I think they told me it would cost about $6.00 and it turned out to cost about twice that; about double.

Q. $7.25, wasn't it?

A. No, I think not; I think it was only about $6. when I was told. I wouldn't be too positive, but it cost pretty near as much again.

Q. Who gave you that information?

117 A. Well, I got it from the Doctor; all the information I got I got from him.

Q. During the discussions between you and him and possibly Mr. McLeish, concerning this improvement, you say you opposed it?

A. I certainly did.

Q. But Mr. McLeish and the Doctor were in the majority?

A. Yes, they were; they were in the majority, and they ruled.

Q. State, if you can, what they said at that time with reference to the manner in which this improvement would enhance the value of your property.

A. Well, it was to get a good road to haul ice on—that is about all; they supposed it would enhance the value of the property, but I had my doubts about it and still have them.

Q. They didn't have any doubts about the value?

A. I don't know what they had.

Q. What did they say?

A. The supposition was that it would enhance the value of the property.

Q. Was there any talk about that time about the amount it would enhance the value?

A. No, not that I know of.

Re-cross examination.

Examined by Judge PUGH:

Q. When did you first learn that the improvement would cost more than $6.00 a foot front, or about that?

A. Oh, it was—I don't know, after all was finished up probably.

Q. At the time the assessment was made?

A. I think it was about the time the assessment was made.

Q. After the road was all finished?

A. After the road was all finished—after the road was all done.

(Mr. DYER:)

Q. Did you know, Mr. Carr, that some changes in the sewers some additions in sewerage there —, didn't you?

A. No, sir; didn't know until it was all done.

Q. You knew it was being done?

A. I seen it done, yes, sir.

Q. Did you know anything of the circle being constructed in this improvement?

A. No; I know there was one constructed; that is all I know.

118 Q. Wasn't there anything said about constructing a sewer?
A. Not that I know of; there was nothing said to me because I didn't have anything to do with that.
Q. Dr. Shepard represented your partnership?
A. Yes, sir. You see in making a grade there it made it cost us thousands and thousands of loads of dirt there to get to the bridge.

(Judge PUGH:)

Q. Do you know when the sewers were built, Mr. Carr?
A. I don't know the time, but I know they were being built.
Q. Isn't it a fact that they were not built until 1892 a year after this improvement was finished, or have you any recollection on that?
A. No, but I think they were put in afterwards; but I won't be positive.
Q. When did you first learn, if you ever learned at all, that the law under which this improvement was made was claimed to be unconstitutional, Mr. Carr?
A. Oh, I don't know anything about that.
Q. Did you learn it until before this suit was brought?
A. No, sir.

And also EMIL KIESSEWETTER, a witness produced on behalf of the defendant, who, being first duly sworn, testified as follows:

Examined by Mr. DYER:

Q. You may state your name?
A. Emil Kiessewetter.
Q. Please state your business?
A. I am vice president of the Ohio national bank, Columbus, Ohio.
Q. I will ask you to state, Mr. Kiessewetter, whether you remember of purchasing East Broad Street extension bonds sometime during the year '90 or '91?
A. I did purchase the East Broad Street improvement bonds for Messrs. Spitzer & Co.
Q. State whether you recollect anything concerning a waiver that was signed by the property owners for that improvement?
A. Before taking up the bonds and paying them off we required a waiver to be signed by all of the property holders, which was done; and after the waiver had been signed and delivered to
119 us, with the papers substantiating the legality of the issue, we took up the bonds and paid for them.

Question and answer objected to as the papers are the best evidence.

Q. There were two issues of bonds on East Broad street, one for $50,000 and another for $60,000?
A. That is right as far as I remember.

Cross-examination.

Examined by Judge PUGH:

Q. Which issue of bonds did you buy, the $50,000 or $60,000?
A. I can't remember positively, Judge, but I think it was the fifty—the first lot.
Q. Did you buy all of the first issue?
A. Yes, sir.
Q. Do you recollect the waiver? If you saw it would you know it?
A. I would, yes, sir.
Q. Is this it (handing witness "Exhibit A")?
A. As far as I can remember that is the paper.
Q. Do you recollect how long after buying the bonds you paid the money?
A. No, I can't remember just exactly.
Q. Approximate the time?
A. I think it may have been fifteen days or more. The records will show that in the court house.
Q. It wasn't more than a month after the bid was accepted?
A. I think not.
Q. Under whose name did you make the bid and purchase?
A. I don't remember whether it was in the name of the Ohio Savings Bank Company, or whether it was in the name of Spitzer & Co.
Q. It was one of the other?
A. It was one or the other, but the bonds were for Spitzer & Co.
Q. The bid was one or the other?
A. Yes, one or the other.

And also A. D. HEFFNER, a witness produced on behalf of defendant, who, being first duly sworn, testified as follows:

120 Examined by Mr. DYER:

Q. State your name?
A. My name is A. D. Heffner.
Q. Your business?
A. Connected with the First national bank.
Q. State whether or not at any time you were an officer of Franklin county, and if so, during what years?
A. Well, I was treasurer of Franklin county in '85?
Q. To what years? Covering what years?
A. '85 to '89.
Q. I will ask you to state, Mr. Heffner, whether or not you are acquainted with the property of complainants known as the Alum Creek Ice Company, which abuts on what is known as East Broad Street improvement?
A. That is where the ice plant is, on the south side?
Q. Yes.

A. Yes, sir.

Q. I will ask you to state whether or not you are acquainted with the market value of this property, or property in that vicinity, prior to the construction of the improvement, of what is known as East Broad street?

A. Yes.

Q. You may state what in your judgment was the reasonable value of that property, either by the acre or by the foot front, prior to the construction of the improvement?

A. Oh, somewheres from five to six hundred dollars.

Q. I will ask you to state, if you can, what the value of that property was after the improvement was completed? I mean immediately after?

A. Well, the property was very materially increased in value by virtue of this improvement, immediately after the improvement.

Q. Give us your judgment in dollars and cents, if you can?

A. Well, that is pretty hard to do unless you get it from sales that were made out there. I know of sale being made as high as $75 a foot front.

Q. Well, considering the location of this property, its surroundings, etc., state whether or not you consider the foot frontage of this property worth $75 a foot front on that road?

A. No, I don't.

Q. Well, what have you to say on that subject?

A. Your question now is immediately after the improvement?

Q. Yes, sir.

121 A. That is a good ways back; I should think that land ought to have been worth $30 a foot front after the improvement.

Q. State whether or not in your judgment the land could have been sold, after the improvement was made, for what it was worth before the improvement was made, and the grantee assuming the assessment, amounting, the records show, to $11.25.

Question objected to by counsel for complainants.

A. I don't understand, do you mean if the property was worth as much after the improvement was made to pay for the improvement?

Q. Yes, sir?

A. I do, yes, sir.

Q. That is, I mean did you consider the value of the property after the improvement was made increased to the amount of the assessment?

A. I did, yes, sir.

Cross-examination.

Examined by Judge PUGH:

Q. During what years were you treasurer, Mr. Heffner?

A. '85 to '89.

Q. Now, the property you say sold after the improvement was completed, sold for $75 per foot front? Do you refer to the Tracy property—the Tracy lot?

A. Yes.

Q. Isn't that differently situated with reference to the improvement from what the Shepard property is?

A. Oh, my, yes, sir; that is more desirable property.

Q. That at the time it was purchased was in a condition to be used for building purposes at once, without any cost?

A. Yes, sir; very desirable location; very finely located.

Q. Did you know where the Stansberry property was, 570 feet?

A. Yes, sir.

Q. Did you know of half of that selling after the improvement for $1000 an acre?

A. I believe I did, yes, sir.

Q. In estimating the value of this property of complainants did you estimate the value of it before or after the fill was made by the complainants?

A. Well, I estimated it after this improvement was made. There has been some filling done there, I don't know. There is filling going on all the time.

122 Q. Did you see the condition of it immediately after the improvement was finished?

A. Oh, yes, I was out there every few days.

Q. The lots after were depressed away below the roadway, wasn't it?

A. Yes, it is undoubtedly, but I couldn't say how much.

Q. Assuming that the complainants spent $5000 to pay for filling of dirt to make their property accessible, what would it have been worth after that filling had been put in?

Question objected to by counsel for defendant because it is immaterial, and witness has answered his estimate was made on the condition before the improvement.

A. I thought I answered that on the condition per foot front before.

Q. Did you notice that there had been filling done?

A. Oh, yes.

Q. Suppose that filling had not been done, what would it have been worth?

A. I don't think that would change my opinion in my original answer.

Q. You don't think the expenditure of $5,000 to put the filling in there to make it accessible helped the value of the property?

A. It did, unquestionably.

Q. Do you know whether that property was ever subdivided into lots?

A. I don't think it was, not to my knowledge.

Q. You being treasurer at that time you would have heard whether it was, wouldn't you?

A. Well, I wasn't treasurer at the time that improvement was made.

Q. Has that property ever been in condition since the improvement was finished to be used for residence purposes, except right in the center of it?

A. No, sir; there would have to be considerable filling there yet, I think.

Q. Isn't the roadway some 15 or odd feet above the land, most of the distance?

A. Well, no, sir, not that much.

Q. It is at the end?

A. It is when you go back aways.

Q. Right at the bridge, or at east end of the bridge, isn't it?

A. Yes, there is a drop there at the bridge.

Q. You had nothing to do with negotiating the bonds?

123 A. No, sir; I have been trying to collect some of them.

Q. Either as agent for anybody, or yourself?

A. No, sir.

Q. What do you say this property was worth per foot front before the improvement?

A. Oh, I think it was reasonably worth $20.

Re-direct examination:

Q. In regard to the question, Mr. Heffner, Judge Pugh suggested to you concerning the fill which is claimed to have been made by complainants. If the property was filled so as to bring it to grade, would there be any other difference in value of this property per foot front and the property east which is at grade?

A. Well, yes, sir; the property east I think is more valuable, because it is higher.

Q. Would you make any distinction or difference in your statement as to the value after the improvement was made if the property to the depth of 250 feet had been brought to grade by filling?

A. I would probably increase my estimate as to the value.

And also CHARLES MCLEISH, testified as follows in rebuttal:

Examined by Judge PUGH:

Q. Was the property of the complainants ever subdivided into lots?

A. No, sir.

Q. I will ask you whether you ever received any notice in writing, or otherwise, to attend a hearing before the county commissioners of the question of benefits, or of the question as to whether the frontage of the property after the improvement was finished, with the improvement, would double the estimated cost of the improvement?

A. No, sir.

Q. When did you first learn that this assessment was illegal, or the law was unconstitutional?

A. Well, I don't remember that.

Q. About the time?

A. I couldn't answer that intelligently; I don't remember the time.

Q. About when with reference to the time this suit was brought?

124 A. Probably a year.

Q. A year before or a year after?

A. About a year ago was the first knowledge I had; that is only guess work; I don't remember positively at all.

Cross-examination.

Examined by Mr. DYER:

Q. Mr. McLeish, state whether or not you know of any case filed in the State courts wherein the question was raised as to the constitutionality of this act?

A. Only by hearsay, from my neighbors.

Q. You had heard them, hadn't you?

A. I heard some rumors about my friend, Mr. Morrison. I took no interest in it; I don't know when it was.

Q. Prior to that time had you heard of any other person in Franklin county claiming this?

A. I heard repeatedly for some time back, but I could not answer intelligently; I could not tell.

Q. For some time before this suit was brought?

A. I heard it right along; I don't know when this suit was first brought myself.

Certificate to Depositions.

STATE OF OHIO, }
Franklin County, } ss:

I, George L. Stoughton, a notary public in and for the county and State aforesaid, duly commissioned and qualified do hereby certify that the above named Andrew Morrison, Walter H. Martin, Charles McLeish, Thomas J. McLeish, Edward Denmead, E. G. Orebaugh, Dr. William Shepard, Frank Tallmadge, Walter Braun, Charles O. Tracy, Leonard Carr, Emil Kiesswetter, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the above depositions were taken in pursuance of an agreement which is attached hereto, as page No. 1 of said depositions, in my presence, and as therein specified.

I do further certify that I am not counsel, attorney or relative of either part-, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 18th day of June, 1900.

[SEAL.] GEORGE L. STOUGHTON,
Notary Public in and for Franklin County, Ohio.

125 *Cost Bill.*

Notary's fees, chargeable to plaintiff		$49 00
Stenographer's fees, chargeable to p'l't'ff		61 75
Notary's fees, chargeable to defendant		10 05
Stenographer's fees, chargeable to defendant		14 55

Plaintiff's Witnesses.

Andrew Morrison	$1 00	
Walter H. Martin	1 00	
Edward Denmead	1 00	
E. G. Orebaugh	1 00	
Frank Tallmadge	1 00	
Walter Braun	1 00	
	$6 00	6 00

Defendant's Witnesses.

Charles O. Tracy	$1 00	
Emil Kiessewetter	1 00	
A. D. Heffner	1 00	
	$3 00	3 00
Total		$144 35

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPARD ET AL., Complainants, *vs.* O. E. D. BARRON, Treasurer, etc., Defendant. } No. —. In Equity. Motion.

Now come the complainants in the above named suit, by Pugh & Pugh, their attorneys, and file this their motion to suppress
126 the testimony offered by the defendant in this case of a paper writing, beginning with the words: "To the honorable board of county commissioners of Franklin county, Ohio: Whereas on the 31st day of March, 1890, a petition signed by the subscribers hereto was, etc." and ending with the names of Logan M. Bullitt, William Shepard, Charles McLeish and others, and which purports to be a

copy from the records of the county commissioners of Franklin county, Ohio, on the following grounds, to-wit:

1. That there is no proof in the case tending to show that the original of this paper was either lost or destroyed.

2. That there is no proof tending to show that either William Sheperd or Charles McCleish ever signed either the original or any copy of the said paper writing, either on the said records or elsewhere.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPHERD ET AL., Complainants,
vs.
O. E. D. BARRON, Treasurer, etc., Defendant.
} In Equity. No. —.

Motion.

Now come the complainants, in the above named suit and move to strike from the testimony offered by the defendant the paper writing, beginning with the words, "To the honorable board of county commissioners of Franklin county, Ohio. Whereas, on the 31st day of March, 1890, a petition signed by the subscribers hereto was, etc.," and ending with the names of Logan M. Bullitt, William Shepherd, Charles McLeish and others, and which purports to be a copy from the records of the county commissioners of Franklin county, Ohio, on the following grounds, to-wit:

127 1. That there is no proof in the case tending to show that the original of this paper was either lost or destroyed.

2. That there is no proof tending to show that either William Shepherd or Charles McCleish ever signed either the original or any copy of the said paper writing, either on the said records or elsewhere.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

WILLIAM SHEPHERD ET AL., Complainants, *vs.* O. E. D. BARRON, Treasurer, etc., Defendant. } In Equity. No. —.

Motion.

Now come the complainants, by Pugh & Pugh, their attorneys, and file this their motion to suppress the deposition of Emil Kiesewetter, a witness who was examined by the defendant, on the ground that the purchasers of the bonds, whom the witness testifies that he represented, are not parties to this suit, and therefore the evidence is incompetent, irrelevant and inadmissible.

PUGH & PUGH,
Attorneys for Complainants.

And afterwards, to wit, on the 19th day of June, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal D, page 535.

On this 19th day of June, 1900, came on for hearing in
128 open court the application of the complainants and Thomas J. McLeish and Joseph Busch, for an order substituting these last two named, as complainants, for Leonard Carr. It appearing to the court that Thomas J. McLeish and Joseph Busch have acquired by purchase the rights of the complainant Leonard Carr in and to the property described in the bill of complaint, and it further appearing that all the rights of the said Leonard Carr in and to the property described in the bill of complaint have been transferred to the said Thomas J. McLeish and Joseph Busche and that they are necessary and proper parties complainants, and the defendant consenting thereto, it is ordered that the said Thomas J. McLeish and Joseph Busch be, and they are hereby, substituted as complainants in the above suit for the said Leonard Carr.

And it is further ordered that this suit shall proceed in their name instead of in the name of the said Leonard Carr.

And afterwards, to wit, on the 19th day of January, A. D. 1901, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Thompson.

United States Circuit Court, Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPHERD, CHARLES MCLEISH, and LEONARD CARR, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924.

This is a suit to enjoin the collection of the remaining installments of an assessment made by the county commissioners upon the lands of the complainants, for the improvement of a street or highway, called in the petition the "improvement of East Broad street," and which practically was the extension of one of the streets of the city of Columbus, Ohio, into adjacent or suburban territory. It was authorized by a special act of the General Assembly of Ohio,
129 passed March 26th, 1890 (87 O. L. 113). The act provided that upon the petition of the "property owners representing a majority of the feet frontage" the county commissioners might, after due notice to the public, and to all the property owners, authorize the improvement, issue bonds to provide for the payment of the costs and expenses thereof, and assess the abutting property by the feet front for the payment of the bonds.

It further provided that the assessment should be a lien upon the abutting property; should be payable in installments, and should be placed upon the tax duplicate for collection.

It further provided that no action should be taken by the commissioners for the improvement until they were satisfied, by personal inspection and examination that with the improvement the foot frontage of the abutting lands would be worth double the estimated expenses of the improvement, "which inspection, examination and estimate, together with their valuation per foot front of said lands," should be made a matter of record.

It further provided that a contract for the improvement should be made by the commissioners, the performance of which should be supervised by a board of improvement appointed by the county commissioners, consisting of two or more owners of the abutting property, and the county surveyor, who were authorized to elect a superintendent to see that the contract was performed according to its true intent, and that all orders of the county surveyor in furtherance thereof were obeyed.

The improvement was duly authorized May 3, 1890. A contract for the work was duly made; a board of improvement was appointed, a superintendent elected, and after a number of changes in the original plan the work was completed on the first of October, 1891. Bonds were issued to the amount of $110,000. The number of feet

front on the improvement owned by the complainants is 9,615.38 feet. The assessment was made October 15, 1891, of which the complainant's proportionate part amounted to $12,812.61.

It is claimed that the collection of the assessment will be a taking of private property for public use, without due process of law, in violation of the fifth and fourteenth amendments to the Constitution of the United States, first, because the method of assessment by the front foot necessarily excludes the consideration of special benefits to the abutting property. Second, because the evidence in fact shows that the assessment against the complainants largely exceeds the special benefits to the abutting property of the complainants.

130 Of the several matters of defence to these claims, I shall consider but one—that of estoppel.

From about 1888 to 1891 there was a "boom" in real estate in the vicinity of the improvement in question, caused by the somewhat large purchases of land by the Philadelphia syndicate, so called, with a view of laying out suburban places or additions to the city. Under the influence of the "boom," the extension and improvement of East Broad street was projected and undertaken to further enhance the value of the lands for building purposes. But the "boom" flourished for a time, and then collapsed, leaving the lands greatly depreciated in value and subject to the burden of a heavy assessment for the cost of the improvement. This burden, however, was borne by the complainants for seven years, and until $8,810.27 of the assessment had been paid, and there remained unpaid but $4002.34. About this time the case of Baker *vs.* Norwood was decided by the Supreme Court of the United States, in which it was held that the method of levying assessments by the front feet necessarily excluded the consideration of special benefits to the property abutting on the improvement, and soon after this suit was brought to enjoin the collection of the balance of the assessment.

The original complainants were partners doing business under the firm name of the Alum Creek Ice Company.

The ice company owned, of the frontage on the improvement, 9615.37 feet. The ice company joined in the petition to the county commissioners for the improvement, and during the progress of the improvement was represented by either Shepard or McLeish, usually by Shepard, who had full authority to represent the firm. Shepherd is a man of prominence, being a physician of good standing, and having served in the General Assembly of Ohio. He was appointed and served as a member of the board of improvement and took an active part in promoting the improvement from the beginning to the end.

On behalf of the company he signed the petition for the improvement and read and understood the law under which the action of the county commissioners was invoked. He knew that the law provided for an assessment of the abutting property by the front foot, for the payment of the cost of the improvement.

On the 29th of June, 1891, the Columbus Land Association, in

order to settle all controversy about the continuation of the improvements of East Broad street from Alum creek to Cassady road, proposed in writing to the county commissioners that if the im-
131 provement was pushed through to completion without delay they would pay the entire expenses in removing the earth from the circle and in beautifying and adorning the circle, and the ice company, through Shepherd, joined with other property owners in signing the following writing:

"The undersigned owners of real estate abutting upon the extension of East Broad street, now being improved under proceedings by and before this board of county commissioners of Franklin county, hereby withdraw all objection to said improvement and the assessment of their said real estate therefor, on condition that the foregoing agreement shall be kept by said Columbus Land Association."

On September 2, 1891, on behalf of the ice company, Shepherd signed a petition to the county commissioners to release the contractor, N. B. Abbott, from sodding the sides of the improved roadways, offering to sow grass thereon instead of sodding.

On September 26, 1891, Shepherd, for the ice company, signed an agreement marked "Exhibit A," which, after reciting the loss of the papers in the case, and the action of the commissioners from time to time, concluded as follows:

"Now in consideration of said improvement and in order that the bonds to be issued to pay for said improvement may not lie under suspicion, or remain unsold by reason of the absence or loss of said original papers, we hereby agree that said petition — hereinbefore recited was filed, signed by us as herein stated, and that we will not set up as a defense against any assessment upon our said property abutting upon said improvement for the payment of bonds issued on account thereof, any informality arising from the absence or loss of any of said papers, but agree that said improvement was legally made and constructed."

Shepherd and McLeish also signed, on behalf of the ice company, a petition to the county commissioners, praying them to cause the bonds issued for the payment of the expenses of the improvement to be made payable twenty years from date, and also praying them, if possible, to have the time of the bonds already sold extended to twenty years, and Shepherd, as a member of the board of improvement, for the same purpose, signed a paper which reads as follows:

"Whereas, the property owners on the East Broad St. improvement have petitioned the hon. board of county commissioners to take steps to have the bonds for said improvement extended so as to run
132 twenty years. Now, therefore resolved, that the board for the improvement of said street hereby respectfully request the county commissioners to do all in their power to carry out the prayer of said petition."

And after the improvement was completed McLeish, for the ice company, in connection with other property owners, signed a petition to the county commissioners to lay sewer pipe in the improvement, in which they agreed "that the expense of said work be as-

sessed against our respective property on said street, the same as other expenses for making said improvement are levied and paid," showing that after the assessment for the improvement had been made and they knew what it was and how it was made, they were still willing to be further assessed to perfect the improvement. An examination of the exhibits attached to the testimony will show more fully the conduct of the complainants during the progress of the improvement.

The complainants invoked the action of the county commissioners to enhance the value of their land; they actively promoted the improvement knowing that it- cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessment for seven years, and until they were tempted by the decision of the Supreme Court, in Baker *vs.* Norwood, to cast their burden upon the general public, and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the "boom." The complainants, Thomas McLeish and Joseph Busch, who purchased the interests of the original complainant, Carr, under the agreement offered in evidence, assumed the payment of the assessment as a part of the purchase money, and are liable for the unpaid installments thereof.

The bill will be dismissed at the costs of the complainants.

And afterwards, to wit, on the 19th day of January, A. D. 1901, the following entry was made on the journal of said court, clothed in the words and figures following, to wit:

Journal E, page 89.

Entry.

This day this cause came on for hearing upon the pleadings and testimony filed herein, and was argued by counsel and submitted to the court; whereupon, upon consideration, it is ordered that this cause be and the same hereby is dismissed at the costs of complainants. To which ruling complainants, by counsel excepts.

133 And afterwards, to-wit, on the 2nd day of January A. D. 1903, the following petition of appeal was filed in the clerk's office of said court clothed in the words and figures following, to-wit.

Petition for Appeal.

United States Circuit Court for the Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} No. 924. In Equity.

Petition for appeal.

Now comes William S. Shepard, Charles McLeish and Leonard Carr, complainants herein, and conceiving themselves to be aggrieved by the decree made and entered on the 19th day of January, 1901, in the above entitled cause, do hereby appeal from said order and decree to the United States Supreme Court, for the reason specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States Supreme Court.

PUGH & PUGH,
Attorneys for Complainant.

134 And afterwards, to wit, on the 2nd day of January A. D. 1903 the following assignment of errors was filed in the clerk's office of said court clothed in the words and figures following, to-wit.

Assignment of Errors.

In the United States Circuit Court, Southern District of Ohio, Eastern Division.

WILLIAM S. SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
} No. 924. In Equity.

Assignment of errors.

And now comes William S. Shepard, Charles McLeish, and Leonard Carr, complainants herein, and says that the decree, in said cause, dismissing the same, is erroneous and against the just rights of the said complainants, for the following reasons:

First. The court erred in refusing to find and adjudge that the assessment upon the property of the complainants, set out fully in their bill, was illegal.

Second. The court erred in refusing to find and adjudge that the said assessment was in excess of the special benefits conferred upon the property of the complainants by the improvement to pay the cost for which the assessment was levied.

135 Third. The court erred in refusing to find and adjudge that the said assessment was levied in violation of the constitutional rights of the complainants, in this, that it violated the provisions of section 1 of the fourteenth amendment to the Constitution of the United States.

Fourth. The court erred in refusing to find and adjudge that the statute of Ohio, under which said assessment was levied, entitled, "An act to authorize county commissioners in counties in which there are situated cities of the first grade of the second class, to improve roads extending from such cities, and other roads and streets in certain cases," passed March 26, 1890, and published in volume 87 Ohio Laws, page 113, and the following pages, was void, because it violated the provisions of section 1 of the fourteenth amendment of the Constitution of the United States.

Fifth. The court erred in finding and adjudging that the complainants were, by their conduct, estopped from maintaining this suit, and claiming the relief prayed for in their bill.

Sixth. The court erred in refusing to issue an injunction restraining the defendant, and his successors in office, as treasurer of Franklin county, Ohio, from collecting that part of the said assessment which is unpaid, by action, suit or otherwise.

Seventh. The court erred in refusing to quiet the title of the complainants, to their property, mentioned and described in their said bill, against the illegal lien of said assessment.

Eighth. The court erred in dismissing the suit of the complainant-, and entering judgment for costs.

136 Ninth. The court erred in not entering a judgment, and rendering a decree in favor of the complainants, as prayed for in their said bill.

Tenth. The court erred in refusing to find and adjudge that the said assessment, if collected, would amount to a confiscation of the complainants' property upon which it was levied.

PUGH & PUGH,
Attorneys for Complainants.

137 And afterwards, to-wit on the 2nd day of January A. D. 1903, the following appeal was filed in the clerk's office of said court clothed in the words and figures following to-wit:

Appeal Allowed.

WILLIAM SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainant-,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924. In Equity.

Appeal allowed.

This 2nd day of January, 1903, came the complainants, by their attorneys, and filed herein and presented to the court their petition praying for an allowance of an appeal, and the assignment of errors intended to be urged by them, and praying also that a transcript of the record and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises; and praying also that the decree rendered by the court against the complainants may be superseded and stayed until the hearing of this cause in said United States Supreme Court. On consideration whereof the court does allow the appeal on the complainants giving bond according to law in the sum of ten thousand dollars.

138 And it is further ordered that said bond shall act as a supersedeas bond as well as a bond for cost and damages on appeal; and upon the execution of said bond, the decree dissolving the injunction previously granted to them and dismissing this suit of the complainants, shall be suspended and stayed until the determination of said appeal by the said United States Supreme Court.

139 And afterwards, to-wit, on the 8th day of January A. D. 1903, the following appeal bond was filed in the office of said court, clothed in the words and figures following, to-wit.

Appeal Bond.

WILLIAM SHEPARD, CHARLES MCLEISH, and Leonard Carr, Complainants,
vs.
O. E. D. BARRON, Treasurer of Franklin County, Ohio, Defendant.
No. 924. In Equity.

Appeal bond.

Know all men by these presents, that we, William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush, as principals, and W. H. Tuthill and F. G. Hatton, as sureties, are jointly and severally

held and firmly bound unto the above named O. E. D. Barron, treasurer of Franklin county, Ohio, or his successor in said office, in the sum of ten thousand ($10,000.00) dollars, lawful money of the United States of America, to be paid to the said Nelson A. Sims, as treasurer of Franklin county, Ohio, his successor in said office, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand nine hundred and three.

140 The condition of the above obligation is such that, whereas, said William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush have taken an appeal to the United States Supreme Court to reverse the final decree made — entered by the circuit court of the United States, sixth judicial circuit, in and for the southern district of Ohio, eastern division, which decree was made and entered in the above entitled suit on the 19th. day of January, A. D. 1901.

Now, therefore, the condition of the above obligation is such that if the above named William Shepard, Charles McLeish, Thomas McLeish, and Joseph Bush, complainants herein, shall prosecute said appeal to effect, and answer all damages and costs, and if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM SHEPARD.
CHARLES McLEISH.
THOS. McLEISH.
JOSEPH BUSH.
WM. TUTHILL.
T. G. HATTON.

Approved:

A. C. THOMPSON,
Judge of the United States District Court for the Southern District of Ohio, Sitting and Holding United States Circuit Court.

141 SOUTHERN DISTRICT OF OHIO, *ss:*

I, W. H. Tuthill, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth fifteen thousand dollars in real estate in my own name, situate in the county of Franklin, in said district.

[SEAL.] W. H. TUTHILL.

Sworn to before me the 5th day of January, 1903.

C. P. WHITE,
Deputy Clerk U. S. Courts, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, F. G. Hatton, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Franklin, in said district.

[SEAL.] W. G. HATTON.

Sworn to before me the 5th day of January 1903.

C. P. WHITE,
Deputy Clerk U. S. Courts, S. D. O.

141½ The United States Circuit Court.

SOUTHERN DISTRICT OF OHIO, *Eastern Division,* } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the proceedings had by and before said court, in the above entitled cause, as the same appears of record and on file in the clerk's office of the court aforesaid.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 9th day of January A. D. 1903, and of the American Independence the one hundred and twenty-seventh.

Attest:—

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By JANIE W. F. COWEN,
Deputy Clerk.

142 THE UNITED STATES OF AMERICA, *ss:*

To O. E. D. Barron, treasurer of Franklin county, Ohio, Greeting:

Whereas, William Shepard, Charles McLeish Thomas McLeish and Joseph Bush have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, eastern division made in favor of you, the said O. E. D. Barron, treasurer, as aforesaid, and *has* filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Columbus, in the sixth circuit, this 8th day of January in the year of our Lord one thousand nine hundred and three.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

A. C. THOMPSON,
Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.

143 [Endorsed:] United States circuit court, No. 924. William Shepard *et al.* — O. E. D. Barron treasurer of Franklin Co. Ohio. Citation to appellee. Filed Jan'y 8, 1903 B. R. Cowen clerk.

For O. E. D. Barron, treasurer &c., respondent in the cause pending in the circuit court of the United States for the southern district of Ohio, eastern division of said district, wherein William Shepard, Charles McLeish, Thomas McLeish and Joseph Bush are complainants and said Barron as treasurer of Franklin county, Ohio, is respondent, mentioned in the foregoing citation, we waive service of the said citation and agree to enter appearance in the Supreme Court of the United States, in said cause.

January 7th 1902

DYER, WILLIAMS & STOUFFER,
TAYLOR, SEYMOUR & WEBBER,
Attorney- for said O. E. D. Barron, Treasurer, &c.

Endorsed on cover: File No. 18833. S. Ohio C. C. U. S. Term No. 217. William Shepard, Charles McLeish, Thomas McLeish, and Joseph Bush, appellants, *vs.* O. E. D. Barron, treasurer of Franklin county, Ohio. Filed February 16", 1903.